TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 22.

THE LACKAWANNA IRON AND COAL COMPANY ET AL., PETITIONERS,

vs.

THE FARMERS' LOAN AND TRUST COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 4, 1895.
CERTIORARI AND RETURN FILED MARCH 19, 1896.

(16,664.)

(16,664.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 162.

THE LACKAWANNA IRON AND COAL COMPANY ET AL., PETITIONERS,

vs.

THE FARMERS' LOAN AND TRUST COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

a UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the 3d day of November, A. D. 1896, and held in the court-room of said court, in the city of New Orleans.

Proceedings before the Honorable Harry T. Toulmin, United States district judge for the southern district of Alabama, the Honorable T. S. Maxey, United States district judge for the western district of Texas, and the Honorable Charles Parlange, United States district judge for the eastern district of Louisiana.

THE LACKAWANNA IRON & COAL COMPANY ET AL. }
vs. }
THE FARMERS' LOAN & TRUST COMPANY ET AL. }

Be it remembered, that heretofore, to wit, on the 4th day of May, 1896, a transcript of the record of the above-stated cause from the circuit court of the United States for the eastern district of Texas, was filed in the office of the clerk of the said United States circuit court of appeals, a true copy of which is set out in the pages hereto annexed.

1–7 In the Circuit Court of the United States for the Eastern District of Texas, in the Fifth Circuit, Holding Sessions at Galveston.

THE FARMERS' LOAN AND TRUST COMPANY, Trustee, }
vs. } No. 227.
THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY, } Equity.
Charles Dillingham, Receiver, and George E. Downs. }

Be it remembered that in the above entitled and numbered cause, lately pending in said court, in which final decrees were rendered at the regular February term of said court, 1896, to wit: on the 26th day of February, A. D. 1896, in interventions of the Lackawanna Iron and Coal Company, the Southern Development Company, the Morgan's Louisiana and Texas Railroad and Steamship Company, the Pacific Improvement Company, Collis P. Huntington and E. H. R. Green and George E. Downs, the Honorable David E. Bryant, judge of the district court of the United States for the eastern district of Texas, presiding, the following proceedings were had and taken in said court, to wit:

8 Circuit Court of the United States, Eastern District of Texas.

THE FARMERS' LOAN AND TRUST COMPANY, Complainant,
vs.
THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY *et al.*, Defendants.
No. 227. Equity.

Original Bill of Complaint.

(Waco and Northwestern Division first mortgage.)

Turner, McClure & Rolston, complainant's solicitors, 20 Nassau street, New York.

Filed of date April 6th, 1889. Don A. Pardee.

Filed April 6th, 1889. C. Dart, clerk.

To the judges of the circuit court of the United States for the eastern district of Texas, sitting in equity:

The Farmers' Loan and Trust Company, a corporation duly created under the laws of the State of New York, a citizen of said State, having its principal office and place of abode in the city of New York, brings this its bill of complaint against the Houston and Texas Central Railway Company, a corporation created under the laws of the State of Texas, a citizen of said State, having its principal office and place of abode in the city of Houston, in said State, and against Charles Dillingham, as receiver of the Houston and Texas Central Railway Company, a citizen of the State of Texas, having his place of abode in the city of Houston, in said State.

And thereupon your orator complains and alleges:

I. Your orator is a corporation duly organized and existing
9 under the laws of the State of New York, and is fully authorized and empowered to receive and hold in trust the lands, railroads, franchises and other property conveyed to it in trust as hereinafter fully stated, and to execute the trusts reposed in it under and by virtue of the mortgage or deed of trust hereinafter set forth. The property which is the subject-matter of this suit, being the property affected by the mortgage to your orator hereinafter set forth, is now in the actual custody of this honorable court through its receiver, duly appointed, as hereinafter more fully stated.

II. The defendant, The Houston and Texas Central Railway Company, is a corporation duly organized and existing under the laws of the State of Texas, having been first known as the Galveston and Red River Railway Company, and its name having been changed by an act of the legislature of the State of Texas, approved September 1, 1856, to the Houston and Texas Central Railway Company. It was by said act invested with the right of making, owning and maintaining a railroad from Galveston bay or its contiguous waters to Red river; and by another act of the legislature, approved May 24, 1873, the Waco and Northwestern Railroad Company, a duly organized corporation, with all its properties, rights, privileges and

franchises, was merged in the Houston and Texas Central Railway Company and became a part thereof. The said Houston and Texas Central Railway Company (which, for convenience, will herein be designated as the railway company), by virtue of said acts and others, and in every respect according to law, became a corporation owning and operating several lines of railroad, namely, a line from Houston to Denison, a distance of 345 miles, known as the main line, a line from the main line at Hempstead to Austin, a distance of 118¾ miles, known as the Western division, and a line from the main line at Bremond to Ross, a distance of 58 miles, known as the Waco and Northwestern division, which latter division, with certain lands and other properties, constitutes the particular subject-matter respecting which this bill is filed.

III. Under certain acts of the legislature of Texas, and especially an act entitled "An act to encourage the construction of railroads in Texas by donations of lands," approved January 30, 1854, and several acts supplemental thereto and amendatory thereof, the railway company became entitled to receive from the State of Texas, to aid in the construction and equipment of its railroad, sixteen sections or square miles of land of the public domain of said State, equal to 10,240 acres, for every mile of its railroad that had been built and that might be built in the future, as the same should be so built.

IV. The said railway company, prior to April 1, 1881, executed and delivered the following mortgages or deeds of trust, namely:

1. A mortgage dated July 1, 1866, covering the main line and ten sections of land for each mile thereof, commonly known as the main-line first mortgage, and under the same Nelson S. Easton and James Rintoul are substituted trustees.

2. A mortgage dated December 21, 1870, covering the Western division and ten sections of land for each mile thereof, commonly known as the Western Division first mortgage, and under the same Nelson S. Easton and James Rintoul are substituted trustees.

3. A mortgage dated June 16, 1873, covering the Waco and Northwestern division and also 6,000 acres of land for each mile thereof, commonly known as the Waco and Northwestern Division first mortgage, which mortgage was made to your orator, as trustee. Your orator still remains trustee under the same, and files this bill in that capacity.

4 A mortgage dated October 1, 1872, covering the main line and Western division as a second mortgage, and also 3,840 acres of land per mile of completed road. This mortgage is commonly known as the main-line and Western Division consolidated mortgage.

5. A mortgage dated May 1, 1875, covering the Waco and Northwestern division and also 6,000 acres of land per mile of completed road. This mortgage is commonly known as the Waco and Northwestern Division consolidated mortgage.

6. A mortgage dated May 7, 1877, covering all the property of said railway company, and commonly known as the income and indemnity mortgage.

7. A mortgage dated April 1, 1881, covering all the property of said railway company, and commonly known as the general mortgage.

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V. On or about February 16, 1885, the Southern Development Company, a California corporation, instituted suit in this court against the railway company, and such proceedings were thereupon had that the railway company and all its property of every sort and description were placed by order of this court, dated February 20, 1885, in the hands of receivers thereby appointed, said receivers being the defendant, Charles Dillingham and one Benjamin G. Clarke. The persons so named as receivers, immediately on their appointment qualified as such and took possession of all the property of the railway company and entered upon the discharge of their duties as receivers, and they continued to act as such until the May, 1886, term of this court, when such proceedings were had in said cause so brought by the Southern Development Company as aforesaid that this court made a decree in said cause, entered May 27, 1886, ordering that certain demurrers filed in said cause be sustained and that the whole bill and supplemental and amended bill of the Southern Development Company, against all the defendants therein named, be and the same thereby were dismissed for want of equity, with costs. Bills in equity, however, having been filed before that time in this court by the trustees of the said main-line first mortgage, and Western Division first mortgage and general mortgage, for the foreclosure of said mortgages respectively, such proceedings were thereupon had, that such bills so filed for such foreclosure were consolidated by an order of this court, entered May 27, 1886, and Nelson S. Easton, James Rintoul and Charles Dillingham were appointed receivers of all the property of the railway company, in the room and stead of the receivers appointed in said cause of the Southern Development Company.

VI. In the said consolidated cause pending in this court, Nelson S. Easton and James Rintoul, trustees, and The Farmers' Loan and Trust Company, trustee, were complainants, and the said Houston and Texas Central Railway Company and others were defendants. In said cause, cross-bills were subsequently filed for the foreclosure of the main-line and Western Division consolidated mortgage, the Waco and Northwestern Division consolidated mortgage, and the income and indemnity mortgage. Thereupon a decree of foreclosure and sale was entered by this court in said cause, in all respects according to law, at the May term of this court, held at Galveston on or about May 4, 1888. In and by said decree, to which your orator prays to refer as in all respects a part hereof, this court ordered, adjudged and decreed that unless said railway company should, within thirty days, pay into court the amounts due upon its mortgages not including the Waco and Northwestern Division first mortgage, then the mortgages, with that exception, should be foreclosed and all its property should be sold, as in said decree particularly provided, the sale, however, of the property, premises and franchises covered by the said first mortgage

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of the Waco and Northwestern division to your orator as aforesaid, to be made subject to said first mortgage on said property.

VII. In pursuance of said decree (the payments of the mortgage indebtedness thereby ordered not having been made) the entire property of the Houston and Texas Central Railway Company was sold by the said master commissioner, September 8, 1888. At such sale all the property of every kind and description covered by the Waco and Northwestern Division first mortgage to your orator, including lands estimated at about 277,220 acres, was sold by the said master commissioner, and purchased by —— ——. The purchase so made by said Downs was made subject in every respect to the lien of the Waco and Northwestern Division first mortgage on said property, so made to your orator, as aforesaid, and a deed of said property has been made and delivered to said Downs, as in said decree provided, but in said deed it is expressly stated that the same was made subject in all respects to the lien of the said first mortgage of the Waco and Northwestern division, made to your orator as aforesaid.

VIII. Nelson S. Easton and James Rintoul, who were appointed receivers with Charles Dillingham, as above stated, have been relieved, of their duties as such receivers, by an order of this court made in said consolidated cause December 7, 1888, and said
13 Charles Dillingham is now in possession as sole receiver of all the property formerly of said railway company, defendant, including the property of every sort and description covered and affected by the Waco and Northwestern Division first mortgage, made to your orator, as aforesaid. Your orator prays to refer to the various pleadings, orders and other papers filed in the causes above mentioned, as parts of this its bill of complaint.

IX. The Waco and Northwestern Division first mortgage, made to your orator by the railway company as aforesaid, was made in all respects according to law, and the same is a first-mortgage lien upon all the property therein described. Your orator annexes to this, its bill of complaint a copy of the said first mortgage, and referring thereto, prays that the same may be taken in all respects as a part thereof.

X. The said Waco and Northwestern first mortgage was made by the railway company to secure a series of its own bonds for $1,000 each, payable to bearer on July 1, 1903, with interest thereon at seven per centum per annum, payable from July 1, 1873, semi-annually, in gold, on the first days of January and July of each year, free from all deduction of taxes, until the principal should be paid, on presentation of certain annexed coupons, at the agency of the railway company in the city of New York or in London, as the said coupons might be stamped. It was in said bonds, and each of them provided that the same should not become obligatory, unless the certificate endorsed thereon was signed by your orator, as trustee, or its successor in the trust; and your orator did so sign and certify 1,140 of the said bonds, and it is informed, and therefore alleges that of the said bonds so certified by it, 1,140 bonds representing $1,140,000 of principal are now outstanding and un

paid, and entitled to the benefit of the security of said mortgage or deed of trust.

XI. In and by said mortgage or deed of trust the said railway company, to secure the payment of said bonds, conveyed to your orator in trust, and to its successors and assigns, all and singular the said railway company's railway, known as the Waco and Northwestern division, built and to be built, beginning at a point
14 on the main line of the Houston and Texas Central railway, in the town of Bremond, Robertson county, passing through the city of Waco, in McLennen county, to Red river, and thence to the northern boundary line of said State, together with all side tracks, turnouts, rolling stock, equipment and materials, all right of way and tracks, depot and shop grounds, tenements, hereditaments, rights and franchises, including and meaning to include all the property, real and personal, then acquired, or which might thereafter be acquired by the said company in the said State of Texas, pertaining to the operation of said division, and also all and singular six thousand acres of land per mile of completed road of the said division, said lands selected and to be selected from ten thousand two hundred and forty (10,240) acres of land per mile of completed road donated by the State of Texas, to aid in the construction of the said Waco and Northwestern Railroad Company.

XII. In the said mortgage or deed of trust, it was, among other things, provided that in case the said railway company should fail to pay the principal, or any part thereof, or any instalment of the interest, or any part thereof, or any of the said bonds, at any time when the same should become due and payable, according to the tenor thereof, and for sixty days after having been demanded, it should be competent for your orator, as trustee, its successors and assigns, to enter upon the said railway and the premises and property therein conveyed, by its attorneys and agents, and take possession of the same, without let or hindrance of the railway company, and every part and parcel thereof and the appurtenances, and appoint an agent to operate and manage the same, and receive the revenue and income thereof, applying the said fund, after the deduction of taxes, necessary expenses and counsel fees, to keep the same in good order and repair, and the surplus to pay the interest and principal of all the bonds which might be due and outstanding and secured thereby *pro rata*, and thereafter to the payment of any contribution due to the sinking fund therein established; and upon the request of the holders of one-fifth in amount of the bonds so in default which might be at any time outstanding under the
15 said deed of trust, it should be the duty of your orator, as trustee, by its president or agent duly appointed in its behalf, to enter upon and take actual possession, with or without entry or foreclosure of said railway and property therein described, and all and singular each and every part and parcel thereof, and assume its management until the arrears of both principal and interest be paid, or the property sold, as therein prescribed, receiving the rents, revenues and income thereof and applying them in the same manner as above stated.

XIII. Default has been made by the railway company and by said purchaser, Downs, and Receiver Dillingham, in the payment on the first day of January, 1886, of the coupon interest due on that day on all the said first-mortgage bonds, and all interest on the said bonds from that day remains overdue and unpaid, including said coupon interest, and each instalment of coupon interest on the same which matured subsequently. Payment of some of such interest has been demanded more than sixty days since.

XIV. By reason of the matters and things hereinbefore alleged, there is due to your orator, as trustee under the aforesaid first mortgage or deed of trust of the Waco and Northwestern division of the Houston & Texas Central Railway Company, or to the holders of said bonds, the amount of the coupon interest which fell due on each and every of said bonds on the first day of January, 1886, and also each and every instalment that has fallen due on the same since that day, with interest on each instalment of the said coupon interest from the time when the same fell due as aforesaid; and no proceedings have been had at law or in equity for the collection of the said mortgage debt or any part thereof save only this suit and certain petitions filed in the said consolidated cause of Easton *et al.*, *vs.* The Houston & Texas Central Railway Company as aforesaid, which petitions, so far as they affected any of the interest on said bonds hereby claimed to be still due and outstanding, have been denied.

XV. Your orator was served, on or about March 5, 1889, with a certain paper-writing in the words and figures following, and subscribed as follows:

16 "To the Farmers' Loan and Trust Company, trustee under the seven per cent. mortgage of the Houston & Texas Central Railroad Company, Waco and Northwestern division:

"We, the undersigned, owners and holders of the seven per cent. first-mortgage bonds of the Houston & Texas — Railway Company, Waco and Northwestern division, to the amounts set opposite our names respectively, do hereby call upon and demand of you that you at once proceed by demand, action or otherwise, to enforce and secure our rights as such bondholders, and execute the duties incumbent upon you under the deed of trust, and thereon to take possession of and operate the mortgaged premises pursuant to the provisions of the mortgage, and thereby secure the payment of interest on such bonds; but we expressly request that until further requested by us, you do not commence or take proceedings to foreclose or enforce the payment of the principal, it being our desire that the interest, not the principal, be enforced.

"Dated, New York, December 25, 1888.

Name.	Address.	Amount.
" Moran Brothers.	68 William street, New York city	$132,000
Mutual Life Insurance Co. of N. Y., by Henry W. Smith.	Nassau and Cedar Sts., N. Y. city	50,000
Chas. R. Lynde	206 Broadway, New York city	50,000
Ambrose K. Ely	134 Gold street, N. Y. city	15,000
Isabel R. Spiller	15 East 19th street	4,000
Pestalozzi im Malhot, by J. H. Hocart.	36 Wall street	2,000
Wm. H. Bibby	149 West 41st street	1,000
Laird and Gray	16 Exchange place	50,000
Pomeroy Bros., att'ys for Horace Belden.	39 Broad street	4,000
H. B. Brundrett	470 Broadway	7,000"

XVI. At the same time when such service was made as aforesaid, your orator was also served with another paper-writing, in the same form, but subscribed only as follows:

" Hetty H. R. Green $250,000"

17 Subsequently, however, and about March 8, 1889, your orator received another paper-writing in the words and figures following, and signed by the same person signing the instrument last above recited, namely:

" N. Y., *March* 6, '89.

" To the Farmers' Loan and Trust Co.

" GENTLEMEN: I hereby request the return of the request made to and left with you as trustee under first mortgage of the Waco & Northwestern Railway Co., & please to consider this as a revocation thereof.

" Yours truly, H. R. R. GREEN."

XVII. Your orator, since the service of the paper-writing dated December 20, 1880, above referred to, has also been served with two other paper-writings in the same form, one of which is subscribed as follows:

" Endicott King,	Washington, D. C.	$1,000
J. E. Fisher,	New York city,	7,000."

and the other of which is subscribed as follows:

" Charles R. Lynde, additional, 206 Broadway, $33,000."

XVIII. Your orator has also been served, on or about March 14, 1889, with a paper-writing in the words and figures following:

" To the Farmers' Loan and Trust Company:

" The undersigned, holders of first-mortgage bonds of the Houston and Texas Central Railway Company, Waco and Northwestern division, to the amount set opposite our respective names, are of the opinion that the best interests of the bondholders require that foreclosure proceedings should be commenced upon the mortgage

under which you are trustee. We are advised that the lands covered by that mortgage ought to be disposed of at the earliest practical moment, so as to avoid the risk of forfeiture. We do not think it wise or prudent for the trust company to take possession of or to operate a branch road such as the Waco and Northwestern division of the Houston and Texas Central railroad is. We regard such a course as prejudicial to the true interests of the bondholders, and likely to imperil both their principal and interest. We
18 therefore request that instead of taking possession of the property you at once commence proceeding- for the foreclosure of the mortgage.

"New York, March 9, 1889.

"Bonds.

$215,000.	Percy R. Pyne, Law Turnure, M. Taylor Pyne,	Trustees under last will and testament of Moses Taylor, deceased.
19,000.	Prescott Hall Butler, trustee under will of Charles P. Clinch, dec'd."	

XIX. The persons subscribing these various writings are, as your orator is informed and believes, holders and owners of the bonds secured by the said Waco and Northwestern first mortgage made by the railway company to your orator as aforesaid, to the extent and amount which they by said writings profess to hold and own; and since the property of the railway company has been in the hands of receivers as aforesaid, your orator has received no request of any kind or description from any holder or owner of such bonds to proceed to enforce the provisions of the said mortgage, nor any intimation or expression of any positive wish or desire on the part of such bondholders as to what the trustee should do in the premises, save only as above stated.

XX. Your orator is informed by the writings served on it as aforesaid and otherwise, that there is a difference of opinion between the holders of the bonds secured by said first mortgage of the railway company on the Waco and Northwestern division, as to the proper course to be pursued under the existing circumstances. From the said requests it seems, and your orator alleges, that holders of bonds to the extent of $556,000 of principal, now desire your orator, as trustee, to proceed under those clauses of said mortgage which provide for your orator, as trustee, taking possession of the mortgaged premises and operating the same; that holders of bonds to the amount of $234,000 of principal, are opposed to that course, desiring the foreclosure of said mortgage; that holders of $300,000 of said bonds (being unknown to your orator) have expressed no opinion on the subject whatever, and that the holder of $250,000 of said bonds, having at one time joined in the first request, has expressed her wish to withdraw therefrom.

19 In consequence of the embarrassed condition of the financial affairs of the Houston and Texas Central Railway Company, and on account of the many difficulties which are manifest upon and from all allegations hereinbefore contained involved in

the execution of your orator's said trust, it is impossible for your orator, as trustee, under the said mortgage or deed of trust, to execute its said trust in the way and manner specified and provided in and by said mortgage or deed of trust without the aid or interposition of this honorable court in chancery sitting; nor can the said trust be executed, as your orator is advised and charges, and the rights of all parties be ascertained and fully protected in the premises, otherwise than by a judicial sale of the mortgaged premises, and all the franchises, property, premises and appurtenances covered by said mortgage or deed of trust. Until such sale can be had, and the proceeds thereof distributed, your orator is likewise advised and charges that it is expedient and necessary that the franchises, property, premises and appurtenances so mortgaged to your orator in trust as aforesaid, be placed in the hands and under the control of your orator, as trustee in possession, or of a receiver, with such powers and control over the same as to the court shall seem right and equitable to be conferred.

In consideration thereof, and forasmuch as your orator is remediless in the premises by the rules of the common law, and can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable; to the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and that they may separately and severally answer make (but not under oath, their answer under oath being hereby expressly waived), according to the best of their knowledge, information and belief, to all the matters and charges aforesaid, and that as fully in every respect as if the same were here again repeated, and they thereunto particularly interrogated; that your orator (or a receiver appointed by this court in this cause) may be placed in possession of all the rights, franchises and property, of every kind and description, covered by the
20 said mortgage or deed of trust, of the Waco and Northwestern division of the Houston and Texas Central railway, with power and authority to operate said railroad under the protection of this court, with the usual powers of receivers in such cases, and with power to proceed to recover by suit or otherwise all property in the hands of other parties covered or affected by the said mortgage or deed of trust; that all the rights, franchises and property of every sort and description described in said mortgage may be declared subject to the lien of the same, and that the same may be held and declared to be a first lien upon the same; that an account may be taken of the amounts due upon the bonds secured by the said mortgage or deed of trust, and now outstanding, for interest, being the amount of the unpaid coupons of said bonds, with interest thereon, and on each of them, from the time when the same respectively fell due; that the amount so found due and also the amount of the principal of the said bonds may be found to be the first lien upon the property covered by the said mortgage or deed of trust, according to the terms of the same; that the defendant, Houston and Texas Central Railway Company and the present owners of aid property may be decreed to pay the amount so found due upon

said coupons, with interest thereon at a short day to be fixed by the court; that in default thereof all the property, franchises and premises covered by the said mortgage or deed of trust, being the Waco and Northwestern division of the Houston and Texas Central Railway Company, and all the lands and properties contained and set forth in the description in said mortgage or deed of trust, may be sold under a decree of this court, according to the law and practice of this court, to satisfy the amount so found due; that out of the proceeds of said sale or the net earnings of said property there may be paid first the costs and expenses of your orator in this suit, and all its expenses of every sort and description involved in the execution of its trust, including proper attorneys' and counsel fees, with a proper compensation to your orator for its own services as trustee, to be allowed by the court, and that the residue thereof may be applied to the payment of the amount due upon the said first-
21 mortgage bonds and the coupons thereto, with interest thereon; that if there be any surplus, it may be applied in such way as this court may direct; and that the defendants in this suit may be barred of and from any equity of redemption of, to, and in the said property and franchises; and that any deficiency on such sale may be entered in this cause as a judgment against the Houston and Texas Central Railway Company, and that your orator may have such other and further relief in the premises as the circumstances of the case may require, and as may be agreeable to equity.

May it please your honors to grant unto your orator a writ of subpœna issuing out of and under the seal of this honorable court, directed to the defendants, The Houston and Texas Central Railway Company, and Charles Dillingham, as receiver of the Houston & Texas Central Railway Company to appear and answer this bill.

And your orator will ever pray, etc.

THE FARMERS' LOAN & TRUST COMPANY,

[L. S.] By R. G. ROLSTON, *President.*

TURNER, McCLURE & ROLSTON,
WILLIE, MOTT & BALLINGER,
Complainant's Solicitors.
HERBERT B. TURNER, *Of Counsel.*

STATE OF NEW YORK, }
Southern District of New York, } ss:

I, Rosewell G. Rolston, being duly sworn, depose and say, that I am the president of The Farmers' & Loan Trust Company, the plaintiff above named, and have been such president for a number of years past; that I have read the foregoing complaint and know the contents thereof, and that the same is true to my own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

I further say that the reason why this verification is not made by the said plaintiff, is that it is a corporation, that I am an officer of

the same to wit: the president, and that my knowledge is derived from having taken my part in the transactions spoken of
22 and otherwise, and my grounds of belief are information communicated to me by the agents of said corporation and others. I further say that the seal affixed to said complaint is the corporate seal of said plaintiff, and was by me affixed to the same by authority of said corporation.

R. G. ROLSTON.

Sworn to before me this 29th day of March, 1889.

JOHN McCLURE,
Notary Public, New York County.

Houston & Texas Central railway, Waco and Northwestern division.

Mortgage or Deed of Trust to the Farmers' Loan and Trust Company of the City of New York, Trustee.

This indenture, made the sixteenth day of June, in the year of our Lord one thousand eight hundred and seventy-three (A. D. 1873), between the Houston & Texas Central Railway Company, a corporation under the laws of the State of Texas, of the first part, and the Farmers' Loan and Trust Company of the City of New York, a corporation existing under the laws of the State of New York, trustee, party of the second part.

Witnesseth: Whereas, the party of the first part, under and by virtue of the laws of the State of Texas, has acquired by purchase, the charter and the right and title of the Waco & Northwestern Railroad Company to, and possession of, its line of railway, and said line, by an act of the legislature of the State of Texas, entitled "An act to provide for the merger of the Waco & Northwestern Railroad Company, with its properties, rights, privileges and franchises, in the Houston & Texas Central Railway Company," approved on the twenty-fourth day of May, A. D. eighteen hundred and seventy-three, has been merged and consolidated with and made a part of the Houston & Texas Central Railway Company, and the said consolidation has been formally accepted by the said companies.

And whereas, the said Houston & Texas Central Railway Company, to meet the expense of constructing and equipping the
23 line of the said Waco & Northwestern railroad, known since the merger or consolidation as the "Waco and Northwestern division," about fifty miles of which have already been constructed and are in actual use in the daily running of trains, have resolved to issue and negotiate, as by law they are duly authorized, a series of bonds of one thousand dollars each, at the rate of twenty thousand dollars to each mile of completed road, which said bonds and the interest to become due thereon, are to be all equally secured by these presents, although issued at different times, and to be authenticated by a certificate signed by the said trustee. The said bonds and coupons to be substantially in form as follows:

(*Bond.*)

THE UNITED STATES OF AMERICA, *State of Texas.*

The Houston & Texas Central Railway Company.

No. —. $1,000.

First-mortgage, Land grant, Sinking-fund, Gold-bearing Bond—Interest at 7 per Centum per Annum, Payable Semi-annually.

The Houston & Texas Central Railway Company, for value received, promise to pay to bearer the sum of one thousand dollars in United States gold coin, at its office in the city of New York, on the first day of July, A. D. one thousand nine hundred and three, with interest thereon, at the rate of seven per centum per annum, from the first day of July, A. D. one thousand eight hundred and seventy-three, payable semi-annually, in gold, on the first days in January and July of each year, free from all deduction of taxes, until the principal sum be paid, on presentation of the annexed coupons, at the agency of the said company in the city of New York, or in London, as the said coupons may be stamped.

This bond is one of a series of one thousand dollars each, numbered consecutively from one upward, issued twenty to each mile of completed road, all of which are equally secured by a deed of trust, bearing date June sixteenth, eighteen hundred and seventy-three, executed by said company unto the Farmers' Loan and Trust Company of the City of New York, trustee, conveying all and singular, the entire line of said company's railway built and to be
24 built, starting from the town of Bremond, in the State of Texas, and passing through the city of Waco, to the Red river, and thence to the northern boundary line of said State, together with all the side tracks, turnouts, rolling stock and other equipment, all right of way, depot and shop grounds, tenements, hereditaments, rights and franchises and all the property, real and personal, acquired and hereafter to be acquired, pertaining and necessary to the operation of the above-described division of said railway; and also, all and singular, six thousand acres of land per mile of completed road—said lands, selected, and to be selected, from the ten thousand two hundred and forty (10,240) acres of land per mile of completed road, donated by the State of Texas to aid in the construction of the said road, now known as the Waco & Northwestern division of the Houston & Texas Central railway.

This bond is entitled to the privileges of a sinking fund, and is convertible into, or receivable at par in payment for any of the lands of the said railway company conveyed to said trustee to secure the payment of this bond by the said deed of trust.

This bond may be registered on the books of said railway company at its agency in the city of New York. After such registration, no transfer, except on the books of said company, shall be valid. On a registration of ownership the holder may, at his option, surrender the coupons, which will then be cancelled, and thereafter interest will be payable to the registered holder or his attorney.

This bond shall not become obligatory, unless the certificate endorsed hereon is signed by the said trustee or its successor in this trust, who shall countersign and deliver this series of bonds at the rate of twenty to each mile of completed road only upon the certificate of the company's chief engineer that each mile is completed.

In witness whereof, the said Houston and Texas Central Railway Company has caused its corporate seal to be hereto affixed [L. S.] and the same to be attested by the signatures of its president and secretary, the twentieth day of June, in the year of our Lord one thousand eight hundred and seventy-three.

—— ——, *Secretary.* —— ——, *President.*

25 $35. (*Coupon.*)

The Houston and Texas Central Railway Company will pay to bearer, on the first day of January, 1874, at its agency in the city of New York, on the surrender of this coupon, thirty-five dollars in United States gold coin, free of all taxes, for semi-annual interest on the first-mortgage bond upon its Waco and Northwestern division.

No. —. —— ——, *Secretary.*

Trustee's Certificate.

The Farmers' Loan and Trust Company of the City of New York hereby certifies that this bond is one of the series of bonds described in and secured by the mortgage or deed of trust within mentioned, and that no more such bonds have been certified by this company than are authorized by said deed of trust.

Now, therefore, this indenture further witnesseth, that for and in consideration of the premises, and of the sum of one dollar to it duly paid by the party of the second part, the receipt whereof is hereby duly acknowledged, and in order to secure the payment of the principal and interest of the said bonds, the Houston & Texas Central Railway Company doth hereby grant, bargain and sell, convey, transfer and confirm unto the said party of the second part, in trust, and to its successors and assigns, all and singular, the said company's railway, known as the Waco & Northwestern division, built and to be built, beginning at a point on the main line of the Houston & Texas Central railway, in the town of Bremond, Robertson county, passing through the city of Waco, in McLennan county, to the Red river, and thence to the northern boundary line of the said State, together with all side tracks, turnouts, rolling stock, equipment and materials, all right of way and tracks, depot and shop grounds, tenements, hereditaments, rights and franchises, including and meaning to include all the property, real and personal, now acquired, or which may hereafter be acquired, by the said company in the said State of Texas, pertaining to the operation of the said division; and also, all and singular, six thousand acres
26 of land per mile of completed road of the said division—said lands selected, and to be selected, from the ten thousand two hundred and forty (10,240) acres of land per mile of completed

road, donated by the State of Texas, to aid in the construction of the said Waco & Northwestern railroad.

To have and to hold the said railway, property, lands, premises and rights hereby conveyed, or intended so to be, unto the said The Farmers' Loan and Trust Company of the City of New York, trustee, and its successors or assigns, *in trust*, for the owners and holders of said bonds, or any of them, subject to the terms and stipulations of said bonds, and the interest coupons thereto annexed, and the provisions of the charter of the said company; and also subject to the possession and management of said party of the first part, and its assigns, so long as said company shall well and truly perform, all and singular, the stipulations of the bonds aforesaid, and the covenants of this indenture.

And in case the said Houston & Texas Central Railway Company shall fail to pay the principal, or any part thereof, or any installment of the interest, or any part thereof, on any of the said bonds at any time when the same shall become due and payable according to the tenor thereof, and for sixty days after having been demanded, it shall be competent for the said trustee, its successors or assigns, to enter upon the said railway and the premises and property herein conveyed, by its attorneys and agents, and take possession of the same without let or hindrance of the said first party, and every part and parcel thereof, and the appurtenances, and appoint an agent to operate and manage the same, and receive the revenue and income thereof, applying the said fund, after deducting taxes, necessary expenses and counsel fees, to keep the same in good order and repair, and the surplus to pay the interest and principal of all the bonds which may be due and outstanding and secured hereby, *pro rata*, and thereafter to the payment of any contributions due to the sinking fund herein established. And upon the request of the holders of one-fifth in amount of the bonds so in default which may be at any time out-tanding under this deed of trust, it shall be the duty of said second party, by its president or agent, duly
27 appointed in its behalf, to enter upon and take actual possession with or without entry or foreclosure, of said railway and property herein described, and all and singular each and every part and parcel thereof, and assume its management until the arrears of both principal and interest be paid, or the property sold as herein prescribed, receiving the rents, revenues and income thereof, and applying them in the same manner as above stated.

And in case default shall be made in the principal sum or sums, by virtue of the said bonds or any of them, or any part thereof, at maturity, the said second party shall, on the written request of a majority of the holders of the bonds so in default then unpaid and outstanding, institute the proper proceedings in the proper courts to procure a decree of sale of said premises and property, and all and singular every part and parcel thereof, or so much thereof as may be necessary to make the payments so in default.

It being understood that the lands hereby conveyed, or so much thereof as may be necessary, shall be first sold by said second party at public or private sale for the best price which can be obtained for

the same without any legal proceedings whatsoever; or the second party may cause the entire railway of the said Waco and Northwestern division, with all its rights, appurtenances, equipments and material of every kind, to be sold at public auction to the highest bidder, first giving three months' notice thereof before the day of sale in one or more of the daily newspapers published in each of the cities of New York, Boston and Houston, stating the time, place and terms of sale with a description of the property to be sold, and upon such sale of the whole or any part of the said property being made, and receiving the purchase-money therefor, the said party of the second part shall execute a deed in fee-simple of the same, which deed shall be a bar against the party of the first part, its successors or assigns, from and against all claim of the said first party, and all its right of redemption therein, and shall convey full and absolute title therein to the purchaser, free and clear of all encumbrance thereon, and of all claims, rights or equities of the said party of the first part, its successors or assigns, and all persons claiming under them forever. And the receipt of said trustee
28 shall be a full and sufficient discharge of said purchaser thereof, and said purchaser, holder of said receipt, shall not be liable or in any way bound to see said purchase-money applied to this trust or in any way answerable for its loss or misapplication, or obliged to inquire into the authority for making such sale. And the said party of the second part shall, after deducting from the proceeds of said sale the costs, counsel fees, and all payments for taxes and assessments and expenses thereof and of managing the said property, and enough to indemnify and save itself harmless from all liabilities arising from this trust, apply so much of the proceeds of the sale of said property as may be necessary to the payment *pro rata* of all the interest and principal of said bonds outstanding as may be unpaid, and shall pay the residue thereof, if any, to the party of the first part, its successors or assigns. It being expressly understood and agreed by the said first party, that in no case shall any claim be made or advantage taken of any valuation, appraisement or extension laws now existing or hereafter to be enacted, by the said party of the first part, its successors or assigns, the benefit of all such laws being expressly waived; nor shall any proceedings be taken to prevent such entry or sale or conveyance as aforesaid.

And it is further covenanted on the part of the said first party, its successors and assigns, that the proceeds of this series of bonds shall be applied, in good faith to the construction, improvement and equipment of said division, made and to be made, and putting the same into operation. It is, however, expressly agreed, that the said party of the first part may dispose of the current net revenues and income of all the said property and railway hereby conveyed, in such manner as it shall deem best, until default shall be made in the payment of the interest or principal of said bonds, or of any one or more of them, and shall have the right to sell and dispose of any of such real estate, or other property, as it may own or acquire, which may not be needed or required for the purposes and business

of the said Waco and Northwestern division, except in the case of the six thousand acre- per mile of completed road, and which sale and conveyance of such outside property, shall transfer the said property and title free from encumbrance of this mortgage or deed of trust, and to change its tracks, and make any and all alterations necessary for the benefit of the same. And it is further expressly agreed and understood that every bond issued under this mortgage or deed of trust shall be countersigned by the said party of the second part, and certified to be one of the series authorized to be issued by virtue hereof, or under this deed of trust, and no bond shall be valid under this deed or entitled to its protection and security unless it shall be so certified.

And the said party of the first part hereby covenants and agrees to and with the said second party that the said first party shall pay to the said trustee, on or about the first day of December, A. D. eighteen hundred and eighty, and of each succeeding year until the series of bonds provided for in this indenture shall be paid off and extinguished, a sum annually equal to two per centum of the amount of such bonds as shall then be outstanding and unpaid; which moneys, together with all moneys which may be received by said second party as such trustee, from the sale of lands in the execution of its said trust, after deducting all costs, charges, and expenses attending such sales, shall constitute a sinking fund for the redemption of said bonds, and shall be faithfully applied to that object.

And it shall be the duty of said second party, on or before the fifteenth day of December, eighteen hundred and eighty, and each ensuing year, to publish in one or more newspapers, in the city of New York, an advertisement setting forth the amount of said sinking fund then on hand, and requesting the holders of said bonds to send written proposals to said second party, specifying the terms respectively for which they would be willing to sell bonds of this series held by them. And said advertisement having been published for sixty days, the trustee shall apply said amount to the purchase of such of said bonds as shall have been offered at the lowest price, provided that the price so to be paid shall not exceed ten per centum premium on the par value of such bonds; but if said bonds cannot be purchased at said rate or at a less rate, it shall be the duty of said second party, without unreasonable delay, to invest the amount on hand, appertaining to said sinking fund, in United States securities, or, with the concurrence of the president and the board of directors of said railway company, in any other securities which the said trustee may select; and all moneys appertaining to the sinking fund which shall come into the hands of said second party from the sales of lands or otherwise shall, for the time being, and until the same can be applied to the purchase of said bonds, or to be invested in stocks as aforesaid, be deposited in one or more of the trust companies in the city of New York, upon the best terms which the said second party, in its reasonable discretion, can obtain for the same.

And when the said several six thousand acres of land for each mile of road built and to be built, hereby conveyed, or intended so

to be, shall be ascertained, surveyed and located, said first party will make schedules and descriptions of the said several sections and parcels of land, from time to time, as the same shall be surveyed and located, and affix thereto the minimum prices at which the same are to be sold.

And said company will furnish said schedules and descriptions duly certified by said railway company, to said second party, together with an affidavit of the president and secretary of the said railway company, that to the best of their knowledge and belief such minimum prices have been affixed, having reference to the relative value of the different sections and parcels of land; and as often as once in each two years the said railway company shall appraise such sections and parcels of land and affix minimum prices thereto as aforesaid, and whenever and so often as such schedule and description of said land shall be made as aforesaid, the same shall be duly acknowledged by said first party, under its corporate seal, and in such manner as to entitle them to be recorded, and shall be duly recorded by said first party in all counties in which said lands may be located; and the description of said lands, when made, shall be deemed and taken as a part of this indenture, with like effect as though said description had been incorporated therein; and whenever said railroad company shall certify, in writing, to said trustee that it has contracted for the sale of any section or parcel of said lands, at a sum not less than the mini-
31 mum prices affixed to the same, and ten per centum at least of the consideration money shall be paid to said second party, and a bond and mortgage contracted to be sold, in proper form, from the purchaser to the said second party, securing the residue of the consideration money, with the interest thereon, at not less than eight per centum per annum, and payable annually, shall be delivered to the trustee, such mortgage having first been duly acknowledged and recorded, the said second party shall make, execute and acknowledge a deed, conveying to such purchaser, his heirs and assigns, all the right, title, interest, estate and property of the said trustees, of, in and to the section or parcel of land so sold, with a covenant that they have not done any act to defeat or prejudice their title to the land so conveyed; provided, that in all cases the true consideration or price of the land shall be set forth in the conveyance, and shall in no case, except as hereafter provided, be less than the minimum price affixed to the same as aforesaid. Sales may also be made in like manner of any section or parcel of said land, at less than the minimum prices affixed as aforesaid, when the president and secretary of the said railway company shall make and furnish to said trustee an affidavit that the price agreed on is, in his opinion, the full market value of the land so agreed to be sold.

The consideration money, on any such sale of said lands may be paid either in whole or in part, by delivering to said trustee, to be canceled, one or more of this series of bonds which may have been issued by said railway company, as aforesaid, at their par value; and payments upon any such mortgage of the purchaser of any of

said lands may be made by delivering to said trustee one or more said bonds at their par value, amounting in the aggregate to said consideration or purchase money; and two or more purchasers of said lands may unite and pay a part or all of the aggregate amount of consideration money of their purchases, or a part or all of the aggregate amount of their mortgages by delivering to said trustees said bonds to the amount of such payment, to be canceled. And the said second party shall, as often as once in each year, if required by the party of the first part, furnish to said first party a de-
32 tailed statement of the land sold by them, and also of the moneys and securities in their hands as such trustee, and of such other matters connected with the trusteeship as the party of the first part may reasonably require.

Whenever the said trustee, party of the second part, shall receive any of the bonds above mentioned in payment for lands sold, or on mortgages held by them as such trustee, or by purchase of such bonds as above provided, the same, with any unpaid interest warrants or coupons annexed thereto, shall be immediately canceled, and shall thereafter only be held as vouchers by said trustee.

And the said Houston and Texas Central Railway Company, for itself, its successors and assigns, doth hereby covenant and agree to and with the said second party, its successors and assigns, for the more fully assuring and conveying the said premises and property, and carrying into effect the objects and purposes of this indenture, to make, execute and deliver, all and singular, such further assurances and instruments as shall from time to time be necessary, and as said trustee or its counsel may deem necessary or advisable.

And it is hereby mutually agreed, and these presents are upon the express condition, that, upon the payment of the principal sum and interest of the bonds herein provided for, the estate hereby granted to the said party of the second part shall be void and the right and title to the premises hereby conveyed shall revert to and revest in said party of the first part, its successors and assigns, without any acknowledgment of satisfaction, reconveyance, re-entry or other act.

And the said party of the second part, its successors in said trust and assigns, shall only be accountable for reasonable diligence in the management thereof, and shall not be responsible for the acts of any agent employed by it, when such agent shall have been employed with reasonable discretion; and that the said party of the second part, and its successors in this trust, shall be entitled to reasonable compensation for their services in the management of said trust. The word trustee, as used herein, shall be understood to mean the trustee for the time being, whether original or substitute.

33 In witness whereof, the said party of the first part, in conformity with the order of the board of directors, has caused its official seal, and the signature of William H. Dodge, its president, to be hereto affixed; and the said party of the second part has, in its corporate name and style, by its president, signed the same, and caused its official seal to be appended hereto, thereby

indicating its acceptance of the conveyance and trusts contained in the foregoing indenture.

[L. S.] W. E. DODGE,
President of the Houston & Texas Central Railway Co.
THE FARMERS' LOAN & TRUST COMPANY,
[L. S.] By R. G. ROLSTON, *Pres.*

Attest: GEO. P. FITCH, *Secretary.*

Signed, sealed and delivered in the presence of
J. AUGUSTUS JOHNSON.
WILLIAM H. CLARKSON.

Amended Bill Making George E. Downs Defendant.

Circuit Court of the United States, Eastern District of Texas.

THE FARMERS' LOAN AND TRUST COMPANY, Complainant, *vs.* THE HOUSTON AND TEXAS CENTRAL RAILWAY Company *et al.*, Defendants. } No. 227. Equity.

Now comes the complainant, and by leave of the court first had and obtained, amends its original bill and says:

1. That as stated in clause VII of the original bill, George E. Downs, who is a citizen of New York, residing in the city of Brooklyn therein, became the purchaser of all the mortgaged property and premises, set forth and described in said original bill, at a sale thereof made in pursuance of a decree of this court made at the Galveston term thereof in May, 1888, in consolidated cause No. 198, upon the chancery docket of this court, entitled Nelson S.
34 Easton *et al. vs.* The Houston and Texas Central Railway Company *et al.*, and the said Downs so purchased the said property and premises subject in every respect to the lien and mortgage of complainant, as set out in its said original bill, and that the said George E. Downs is a necessary party to this suit;

Wherefore, complainant makes the said George E. Downs a party defendant hereto.

To the end, therefore, that the said defendant Downs may answer the several matters and things hereinbefore stated in complainant's original bill as fully and particularly as if they were herein again repeated (the answer under oath being hereby expressly waived); and the said defendant was thereto specially interrogated, and that the said mortgaged premises may be sold in the manner and for the purposes as in said original bill prayed, the full prayer of which is now here alluded to and adopted; and that complainant may have such other and further relief as its case may require.

May it please your honor- to grant unto complainant an order directing the said Downs to appear, plead, answer or demur by a certain day, to be designated, which order shall be served on the

said Downs, if practicable, wherever found; and in the alternative it prays that if such personal service cannot be had upon the said Downs, that your honors will grant unto complainant an order of publication, giving notice to the said Downs, who is a non-resident, as before stated, of the substance and object of complainant's bill, and warning him to appear in this court, in person or by solicitor, on or before a certain day, to be designated, to appear, plead, answer or demur, and to show cause, if any he has, why a decree ought not to pass as prayed.

And as in duty bound your orator will ever pray, etc.

TURNER, McCLURE & ROLSTON,
WILLIE, MOTT & BALLINGER,
Compl't's Solicitors.

M. F. Mott, one of the solicitors of complainant, being duly sworn, on oath saith that the matters and things set forth in the foregoing amended bill as stated upon knowledge are true, and those stated upon information and belief he believes to be true.

M. F. MOTT.

35 Sworn to and subscribed before me Dec. 3d, 1889.
[SEAL.] C. DART,
Com'r U. S. Circ't Court, E. D. T.

Indorsements: "No. 227. Equity. The Farmers' Loan and Trust Company *vs.* H. & T. C. R'y Co. *et al.* Amended bill making George E. Downs defendant. Filed Dec'r 3d, 1889. C. Dart, clerk. Turner, McClure & Rolston; Willie, Mott & Ballinger."

Order Appointing Receiver of the Waco and Northwestern Division.

Circuit Court of the United States, Eastern District of Texas.

THE FARMERS' LOAN & TRUST COMPANY
versus
THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY ET ALS.

This cause came on to be heard this sixth day of April, 1889, on the application of complainant for the appointment of one or more receivers.

Present: David McClure, Esq., solicitor for complainant; W. B. Botts, Esq., solicitor for defendants.

Whereupon, and on consideration whereof, the court consenting that said Charles Dillingham, as receiver of the Houston & Texas Central Company, be a party defendant herein; it is ordered, adjudged and decreed by the court that Charles Dillingham, who is already in possession of the Houston & Texas Central lines of railway as receiver, under orders of this court, be, and he is hereby appointed receiver, under the prayer of the bill so filed for the foreclosure of the said Waco and Northwestern Division first mortgage, of all the railway and property which is covered by said mortgage, with power to manage and operate the same, and prosecute and

defend all suits connected therewith, and generally to discharge all the duties of receiver respecting such railway property, and that he be appointed such receiver without giving further bond than that which he has already filed in the consolidated cause.

36 And it is further ordered that said receiver hereafter make and file separate accounts, and make and file his reports and accounts in this cause, keeping and stating the earnings and expenditures of the entire railway property under his charge, so as to show at all times and with all practicable accuracy the separate earnings and expenses of the Waco and Northwestern division of said railway, and that he apply the earnings of said railway in such manner as the court shall from time to time order.

And it is further ordered that all sales of lands belonging to the said Waco and Northwestern division, and covered and affected by the said first mortgage, be conducted in the same manner as the court has already directed with regard to sales of the Houston and Texas Central lands generally in the consolidated cause, and in accordance with the system now in operation, and that the proceeds of such sales be turned over to the trustee, and that the trustee give deeds as has hitherto been done.

And it is further ordered, that said trustee make and file quarterly with the special master, John G. Winter, full and complete statements of all the funds coming into its hands, and of all investments made by it, and all sums expended by it in the administration of its trust, and that the receiver pass his accounts every three months before said John G. Winter, as special master, on due notice and at such time and place as the said master may appoint, and that the said receiver further report to this court at each and every term thereof. The clerk will file this order and the bill of foreclosure in this case, of date April 6th, 1889.

DON A. PARDEE,
Circuit Judge.

April 6th, 1889.

Indorsed: No. 227. Equity. The Farmers' Loan & Trust Co. *v.* The Houston & Texas Central Railway Co. *et als.* File of date April 6th, 1889. D. A. P. Order appointing receiver. Filed April 6th, 1889. C. Dart, clerk.

37 *Answer of Charles Dillingham, Receiver.*

In the Circuit Court of the United States, Eastern District of Texas.

THE FARMERS' LOAN AND TRUST COMPANY, Complainant,
vs.
THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY and Charles Dillingham, as Receiver of the Houston and Texas Central Railway, Defendants.

The separate answer of Charles Dillingham as receiver of the Houston and Texas Central Railway Company, one of the defendants in suit of The Farmers' Loan and Trust Company, complainant, *vs.* The Houston and Texas Central Railway Company and Charles Dillingham as such receiver, defendants.

Charles Dillingham, as receiver of the Houston and Texas Central Railway Company, one of the defendants in the suit above named, saving and reserving all manner and benefit of exception that can or may be had or taken to the complainant's bill, because of the many errors, imperfections and insufficiencies therein contained, for his separate answer to said bill, or so much thereof as he is advised is necessary for him to answer, answering, says:

First. From information which he believes to be true, he admits that the complainant is a corporation under the laws of the State of New York, but he does not know, nor is he advised, and, therefore, cannot admit, that said corporation is authorized or empowered to receive or hold in trust, lands, railroads, franchises or other property, or to execute trusts, as alleged in the complainant's bill.

Second. He admits that the Houston and Texas Central Railway Company was organized under the laws of Texas, as a railroad corporation, at or about the dates mentioned in complainant's bill, and that by virtue of its corporate powers it acquired its main line and franchises substantially as set forth in paragraph II of complainant's bill.

Third. He admits that said railway company, under the
38 laws of Texas, acquired lands to aid in the construction of its main line and several branches substantially as set forth in paragraph III of complainant's bill.

Fourth. He admits, upon information and belief, that said railway company, at or about the dates mentioned in paragraph IV of complainant's bill, made, executed and delivered the several mortgages therein mentioned, each one covering in a general way the railroad and lands specifically named in said paragraph.

Fifth. He admits the filing of the bill by the Southern Development Company, on or about the 16th of February, 1885, and that all the property of said railway company, of every sort and description, was placed by order of this honorable court in the hands of receivers, as therein stated, and that said suit resulted as stated in paragraph V of said bill, except that, as he is informed and believes, an appeal to the Supreme Court of the United States was

taken by the Southern Development Company from the decree of this court thereon, which appeal is still pending and undetermined in said Supreme Court.

He admits that bills in equity were filed in this court by the trustees of the main-line first mortgage, Western Division first mortgage, and a general mortgage for the foreclosure of said mortgages respectively, and proceedings were thereupon had substantially as stated in said paragraph.

Sixth. He admits that after the consolidation of said causes, as stated in paragraph VI of complainant's bill, mortgages were foreclosed substantially as therein stated, and the property conveyed by them decreed to be sold as mentioned in complainant's bill, subject however, to the first mortgage to the complainant on the Waco and Northwestern division.

Seventh. He admits that in pursuance of said decree, the entire property of said railway company was sold *on* or about the time stated in paragraph VII of complainant's bill, and admits and avers that at said sale, all the property and premises, rights, privileges, immunities and franchises of every kind and description, covered by the Waco and Northwestern Division first mortgage to complainant, including the lands as therein stated, was sold by the master commissioner, and purchased by one George E. Downs, and
39 that said said sale and purchase was in every respect subject to the lien of the said first mortgage to the complainant on said property but without any personal assumption of the payment of said mortgage on the part of the purchaser. He also admits and avers that a deed thereof has been made and delivered to said Downs as provided by the decree of said court, and that said deed was made subject, in all respects, to the liens of said first mortgage to complainant but without any personal assumption of the payment of said mortgage on the part of the purchaser.

Eight. He admits that Nelson S. Easton and James Rintoul who were appointed receivers with this respondent have been relieved of their duties as such, by an order of this honorable court made in said consolidated cause, and that this respondent, by order of the court, is now in possession as sole receiver, of all the property formerly of said railway company, including the property of every sort and description covered by the Waco and Northwestern Division first mortgage to complainant.

Ninth. This respondent does not admit that complainant's mortgage is a first lien upon the property thereby conveyed, but on the contrary, he avers that the Lackawanna Iron and Coal Company, the Southern Development Company, Morgan's Louisiana & Texas Railroad and Steamship Company, and others claim to be entitled to liens on said property paramount and superior to any lien of said first mortgage to complainant therein, for the particulars of which claims this defendant refers to the claims of intervention heretofore filed by such parties in the said consolidated cause, and which are still pending undetermined therein. He admits that the copy of said mortgage appended to complainant's bill is substantially a true

copy of said original mortgage, so far as he knows or has reason to believe.

Tenth. Respondent admits that said Waco and Northwestern first mortgage was made to secure a series of bonds substantially as stated in paragraph 10 of complainant's bill, and that said bonds were in substance and effect the same as set forth in said paragraph; but as they were issued before this respondent had any connection with the property of said railway company, and having no personal knowledge of said mortgage, he does not know, and, therefore, cannot admit what number of bonds, if any, have been signed or certified by the complainant, nor what number or amount of them, if any, is now outstanding or unpaid, or entitled to the benefit of the security of said mortgage.

Eleventh. He admits that said mortgage conveys, or purports to convey in trust, all and singular the properties mentioned therein and referred to in paragraph XI of complainant's bill.

Twelfth. He admits that the said mortgage or trust deed contained provisions substantially as set forth in paragraph 12 of complainant's bill.

Thirteenth. He admits that said railway company has made default in the payment of interest on said bonds from the time stated in paragraph XIII of complainant's bill. Whether said Downs has paid all, or any part of said interest, this defendant is not informed and does not know. This respondent is not advised, nor does he know what amount, if any, of interest on said bonds remains overdue or unpaid, as alleged in paragraph XIV of complainant's bill, or what demands may have been made for payment thereof.

Fourteenth. This respondent is not advised, nor does he know what amount, if any, may be due to complainant or bondholders upon, for, or in respect of coupon interest on any such bonds.

Fifteenth. This respondent has no knowledge or information as to any of the matters alleged in paragraphs XV, XVI, XVII, XVIII, XIX and XX, of complainant's bill, except as informed by the allegations in said paragraphs, and, therefore, he is not prepared to admit or deny such allegations, or any of them.

Sixteenth. He neither admits nor denies, but submits to the judgment of the court, the matters set forth by complainant in the paragraph constituting folios 40 and 41, on page 14 of the printed copy of said bill of complaint, being the paragraph immediately following paragraph XX of said bill.

Seventeenth. The respondent further answering, says that at the time of the institution of this suit he had no other relation to, or connection with, or interest in, the property described in the
41 bill of complaint in said suit, and claimed to be covered by the mortgage sought to be foreclosed therein, except as he had been, and was, receiver of the same, together with other property, appointed by this court in the suit of the Southern Development Company, and in the consolidated cause hereinbefore mentioned under orders and decrees of said court in said suits, and that he has now no other or further relation to, or connection with or interest in the same, except as by an order heretofore made in this

suit, his receivership of said property has been extended to this suit; that prior to the time of the institution of this suit all the property of the Houston and Texas Central Railway Company which was covered by the so-called first mortgage to complainant on the Waco and Northwestern division of the Houston and Texas Central railway, had been sold at judicial sale as hereinbefore stated, and duly conveyed to one George E. Downs, who, as this respondent is informed and believes, at the time of such purchase was, and has ever since been, and still is a resident of the city of Brooklyn, in the State of New York, and a citizen of said last-mentioned State. That this respondent prays leave to refer, with the like effect as if the same and the contents and effect thereof were here fully and at large set forth, to the decree for the sale of said property, the proceedings in respect to such sale, the order of confirmation thereof, and the deed of conveyance of the property so purchased by said Downs, and the certificates of record of such deed, and he avers that as he is informed and believes the said Downs duly paid the purchase price of said property so purchased by him, and since about the day of the date of said last-mentioned deed, and since a date long prior to the institution of this suit, has been the sole owner of the said property so purchased by and conveyed to him, and has not in anywise sold or disposed of the same, and this respondent is advised by his counsel that the said Downs is a necessary and indispensable party to any suit for the foreclosure of said so-called first mortgage on the Waco and Northwestern division of the Houston and Texas Central railway, and must be brought in and made a party to said suit before the rendering of any decree for the foreclosure of such mortgage, or any sale of such property.

42 Eighteenth. For greater certainty, and by way of qualification to that extent, if need be, of the admissions hereinbefore in this answer contained, this respondent prays leave to refer to the originals, or duly certified copies of the acts of the legislature, records of proceedings in suit, mortgages, deeds of trust, and other documents in said bill of complaint, or in this answer referred to, with the like effect as if the same and the contents and effect thereof were herein fully and at large set forth.

This respondent, being only the custodian of said property under the orders of this honorable court, and now having fully answered, prays to be hence dismissed with his reasonable costs in this behalf expended, including a reasonable fee for advice and preparation of this answer.

CHAS. DILLINGHAM.

BAKER, BOTTS & BAKER,
Counsel & Sol'rs for Def't Chas. Dillingham.

STATE OF TEXAS, }
Harris County. }

I, Charles Dillingham, one of the defendants in the foregoing cause, having read the foregoing answer, and being duly sworn, do say that the matters and things in said answer contained, as alleged

of my own knowledge, are true, and that those alleged on information I believe to be true.

CHAS. DILLINGHAM.

Subscribed and sworn to before me this 3d day of September, A. D. 1889.

[Seal. 3634/201/2.]

J. C. KIDD,
Notary Public, Harris County, Texas.

Indorsements: "No. 227. Equity. U. S. circuit court, district of Texas. Farmers' Loan and Trust Company against Houston and Texas Central Railroad Company *et al.* Answer of Charles Dillingham, receiver. Filed Sep. 4, 1889. C. Dart, clerk, by W. L. Hanscom, deputy."

43 United States Circuit Court, Eastern District of Texas, at Galveston.

THE FARMERS' LOAN AND TRUST COMPANY *against* GEORGE E. DOWNS, Impleaded with THE HOUSTON & Texas Central Railway Company and Charles Dillingham, as Receiver. } No. 227.

Separate Answer of George E. Downs.

The defendant, George E. Downs, saving and reserving to himself all benefit and advantage of exception or otherwise to which he may be or become entitled by reason of the manifold errors, uncertainties and insufficiencies of the bill of complaint in the above-entitled suit for answer thereto, or to so much and such parts thereof as he is advised it is material for him to make answer unto, answering, says:

First. He admits and avers that the complainant, at the time of the commencement of said suit, was, and has ever since been, and still is, a corporation created under the laws of the State of New York, and a citizen of said State, having its principal office and place of abode in the city of New York, and that this defendant, at the time of the commencement of said suit, was, and has ever since been, and still is, a citizen of the said State of New York, having his place of abode in the city of Brooklyn, in said State. He is advised and therefore avers, that this court was and is wholly without jurisdiction of this suit or the matters involved therein.

Second. He has no knowledge and is uninformed save by said bill in respect to the other matters alleged in article 1 of said bill, or in respect to any of such matters.

Third. He has no knowledge and is uninformed, save by said bill, as to whether, by act of the legislature of the State of Texas, approved May 24th, 1873, or otherwise, the Waco & Northwestern Railroad Company, or its properties, rights, privileges or franchises, was or were merged in the Houston & Texas Central Railway Com-

pany, or became a part thereof, or whether the Houston &
44 Texas Central Railway Company, by virtue of said acts, or otherwise, or according to law, became a corporation, owning or operating a line from its main line at Bremond to Ross, known as the Waco and Northwestern division, or by any other name, or whether under any acts of the legislature of Texas, or otherwise, the said railway company became entitled to receive any land from the State of Texas for or in respect of the whole or any part of any such line from the main line at Bremond to Ross.

Fourth. He admits, upon information and belief, that at or about the several dates stated, on that behalf in article IV of said bill, the said Houston & Texas Central Railway Company executed certain mortgages or deeds of trust, but prays leave to refer to the originals or certified copies of such mortgages or deeds of trust, for the contents, purport and effect thereof, and denies each and every allegation in said bill contained in respect to the contents, purport and effect thereof, except so far as upon an inspection of the said mortgages or deeds of trust or certified copies thereof, such allegations may be found to be correct and true, and he has no knowledge and is uninformed, save by said bill, as to whether or not the said mortgage or deed of trust, dated June 16, 1873, made to the complainant, did in fact cover the Waco and Northwestern division, so called, or six thousand, or any other number, of acres of land for each mile thereof; and he requires strict proof thereof.

Fifth. He has no knowledge and is uninformed save by said bill as to the allegations in article V or VI of said bill or any of such allegations except that as he is informed and believes that in a consolidated cause pending in this court, wherein Nelson S. Ea-ton and James Rintoul, trustees, and The Farmers' Loan and Trust Company, trustee, were complainants, and The Houston & Texas Central Railway Company and others were defendants, a decree of foreclosure and sale was entered by this court at the May term thereof held at Galveston on or about May 4, 1888, to which decree of foreclosure or sale or a certified copy thereof he prays leave to refer for the contents, purport and effect of said decree, and he denies each and every allegation in said bill contained in respect
45 to the contents, purport and effect thereof, except so far as upon reference to said decree or a certified copy thereof, the same may be found to be correct and true. He admits and avers that at the sale under such decree all the property of every kind and description covered by the so-called Waco and Northwestern Division first mortgage was offered for sale by the master commissioner appointed by said decree, subject to the said mortgage, but without any personal assumption of the payment of such mortgage on the part of the purchaser, and was purchased by this defendant; and that a deed of the property purchased by this defendant has been made and delivered to him, which deed, or a certified copy thereof, will be produced upon the trial of this cause, and to which deed or a certified copy thereof, this defendant prays leave to refer for the contents, purport and effect thereof. He admits and avers that the property sold by the said master commissioner, and purchased by

this defendant at the sale hereinabove referred to, included lands which were estimated at about 277,220 acres, as stated in the master commissioner's notice, under which such sale was made, and in the deed from the said master commissioner to this defendant, the same being, as this defendant was informed and believes, a portion of the lands described in the said so-called Waco and Northwestern first mortgage, as being lands conveyed thereby; and he avers upon information and belief that such lands so conveyed, or purported to be conveyed, by such mortgage still remain, for the most part, unsold and undisposed of, less than one-third thereof having been heretofore sold, or contracted to be sold; and that the same are of substantial and considerable value; and that the same are the lands in respect to which it is expressly prescribed in said mortgage that they, or so much thereof as may be necessary, shall be first (that is to say prior to the institution of proceedings to procure a decree of sale of any of the mortgaged premises or property), sold by the complainant at public or private sale for the best price which can be obtained for the same, without any legal proceedings whatsoever; but he avers upon information and belief that
46 such lands were not, nor were any of them, so sold prior to the institution of this suit, nor have they, or any of them, been since so sold.

Sixth. He has no knowledge and is uninformed save by said bill as to the allegations contained in subdivision VIII of said bill or any of them.

Seventh. He has no knowledge and is uninformed save by said bill as to the allegations contained in subdivision IX of said bill, or any of such allegations, except that upon information and belief he admits that a substantially correct copy of the so-called Waco & Northwestern first mortgage is annexed to said bill. He does not admit that such mortgage is a first lien upon the property purporting to be covered thereby, but he avers upon information and belief that the Lackawanna Iron and Coal Company, the Southern Development Company and Morgan's Louisiana & Texas Railroad & Steamship Company, and Thomas M. Shirley and others claim to be entitled to liens on said property paramount and superior to any lien of said mortgage to complainant thereon, for the particulars of which claims this defendant refers to the petitions of intervention heretofore filed by some of such parties in the said consolidated cause, and which are still pending undetermined therein, and to the record of proceedings in a suit heretofore instituted by said Shirley against the Houston & Texas Central Railway Company and others, in the district court of McLennan county, in the State of Texas, from which, as this defendant is informed and believes, it appears: That in 1869, the Waco Tap Railroad Company is alleged to have entered into a contract in writing with one Thomas M. Shirley to construct its line of railway, with the exception of furnishing the rails, from its junction with the Houston & Texas Central railway to Waco, a distance of about fifty (50) miles. That on July 16th, 1870, said Shirley filed suit in the district court of McLennan county, Texas, to recover damages, actual and ex-

emplary, for breach of contract, in which suit he alleged that his claim was an equitable lien arising from said alleged contract; that said suit has been tried a number of times, in which large verdicts were rendered, which were appealed. That said suit was tried February 2d, 1875, which resulted in a judgment in favor of said Shirley for $107,682.95, from which the Waco
47 Tap Railroad Company appealed to the supreme court, and upon hearing the judgment was reversed and the cause remanded. That an amendment was filed April 2d, 1876, making the Houston & Texas Central Railway Company a party defendant; and on November 11th, 1876, a second trial of said suit was had in said district court, which resulted in a judgment for plaintiff for $100,010.50, from which the Houston & Texas Central Railway Company appealed, and upon hearing the judgment of the district court was reversed and said cause remanded. That on November 10th, 1881, plaintiff again filed an amendment to his petition, in which he made the directors of the Waco & Northwestern Railroad Company parties defendant; and the cause was again tried in said district court October 19th, 1885, which resulted in a verdict and judgment against the Waco & Northwestern Railroad Company in the sum of $16,453.90 for money and interest found to be due Shirley, and a judgment of foreclosure of his alleged equitable mortgage on the forty-five (45) miles of road from the town of Bremond to the city of Waco; and also for $96,602 against the Waco & Northwest- Railroad Company as damages, but which claim for damages was declared not to be a lien upon the road. That from this judgment Shirley appealed to the supreme court, and in 1889 said judgment was again reversed and the cause remanded, with instructions to the court below to try the issue whether the sale of the Waco & Northwestern railroad made to the Houston & Texas Central Railway Company was fraudulent as to Shirley's right as a creditor of said Waco & Northwestern Railroad Company, and to try no other issue then made or presented by the pleadings in the case; and if upon a trial of said issue it should be found that said sale was not fraudulent, then, and in that event, judgment should be entered against the trustees (the former directors) for the stockholders and creditors of said Waco and Northwestern Railroad Company, in their representative capacity only, for the sum of $16,453.90, with interest on said sum from October 19th, 1885, together with a foreclosure of said Shirley's alleged lien upon the railway, and appurtenances thereto belonging, from the town of Bremond to the city of Waco, and that judgment should be
48 rendered against said trustees for the sum of $96,602, with interest thereon from said October 19th, 1885, to be paid out of any assets in their hands as such trustees. That said court further instructed that if, upon a trial of said issue, it should be found that the sale of the said Waco and Northwestern railroad and its appurtenances was made with the intent to defraud the creditors of said Waco and Northwestern Railroad Company, then, and in that event, the said Waco and Northwestern Railroad Company should be adjudged subject to sale for the satisfaction of the judgment to be

rendered in favor of Shirley against the said trustees. That the case was again tried on the 15th day of October, 1890, and judgment was entered in favor of said Shirley against the surviving trustees of the Waco and Northwestern Railroad Company, in their representative capacity, for the sum of $24,671.63, with interest at the rate of ten per cent. per annum from that date, together with a judgment for foreclosure of the alleged equitable mortgage on the railroad extending from the town of Bremond to the city of Waco, and upon the road bed and right of way, superstructure, rights, properties and franchises, stated to be in the possession of the defendant, The Houston and Texas Central Railway Company. That it was further adjudged that the plaintiff, T. M. Shirley, should recover from said trustees, in their representative capacity, the further sum of $135,199.86, which, together with the former sum of $24,671.62, aggregates the sum of $159,871.48. That it was further adjudged that the said sale, made by the Waco and Northwestern Railroad Company to the Houston and Texas Central Railway Company, be canceled and set aside as to the rights of the plaintiff Shirley as a creditor of said Waco and Northwestern Railroad Company, and the property so conveyed to the said Houston and Texas Central Railway Company was decreed by the court to be subject to sale for the satisfaction of the aggregate judgment of $159,171.48; and said alleged equitable mortgage was decreed to be foreclosed, and the sheriff of McLennan county was directed and ordered to enter, seize and levy upon the said railway extending from the town of Bremond to the city of Waco as a whole, and to sell the
49 same as under execution at Waco, McLennan county, for the satisfaction of said aggregate judgment, interest and all costs.

Eighth. He has no knowledge and is uninformed save by said bill as to the allegations contained in subdivisions X, XI or XII of said bill, or any of them except so far as such allegations relate to the contents of the so-called Waco and Northwestern first mortgage and of the bonds purporting to be secured thereby, as to which he prays leave to refer to the original of such mortgage and bonds when the same may be produced in this suit.

Ninth. He has no knowledge and is uninformed save by said bill as to the allegations contained in subdivisions XIII, XIV, XV, XVI, XVII, XVIII, XIX and XX, and the unnumbered paragraph at the top of page 14 of the printed bill in this suit, beginning with the words "In consequence of the embarrassed condition" and concluding with the words "shall seem right and equitable to be conferred," or any of such allegations except that he is advised and therefore charges that any trust imposed upon the complainant under the Waco and Northwestern first mortgage can be executed and the rights of all parties ascertained and fully protected in the premises otherwise than by judicial sale of the mortgaged premises.

Tenth. This defendant shows that it doth not appear by the averments of said bill that the complainant is entitled to have a receiver for the rents, revenues or income of said railway; nor does it appear that complainant is entitled to apply the same to the payments of the principal and interest alleged to be due under said mortgage,

wherefore this defendant doth demur to the complainant's right to relief in this respect and to so much of said bill as relates thereto.

Eleventh. Respondent shows and suggests to the court that all the property, rights and franchises of the Houston & Texas Central Railway Company having been sold out, as appears from the complainant's bill, the persons who were directors of said company at the date of said sale became the trustees of such sold-out corporation under the laws of the State of Texas, and as such were at the date of the filing of complainant's bill, and still are, its sole legal representatives, and as such were and are necessary parties to this
50 suit, and that until they are brought in and impleaded there is a defect of parties in the cause and the court cannot proceed to final decree. The following is a list of said directors, all of whom are within the jurisdiction of this honorable court for the purposes of this suit, viz: Alexander C. Hutchinson and J. George Schriever, residents and citizens of the city of New Orleans, State of Louisiana; Collis P. Huntington and Isaac E. Gates, residents and citizens of the city and State of New York; Eber W. Cave, Charles Dillingham, John J. Atkinson, residents and citizens of Harris county, State of Texas; Abraham H. Swanson, a resident and citizen of Corsicana, State of Texas, and Charles Fowler, a resident and citizen of Galveston, in the State of Texas.

And now having fully answered complainant's bill, this respondent prays to be hence dismissed with his reasonable costs in this behalf expended.

GEORGE E. DOWNS,
By ROUSE & GRANT,
His Solicitors.

Indorsements: No. 227. United States circuit court, east dist. Texas. Farmers' Loan and Trust Co. *vs.* Houston and Texas Cent. Railway Co. *et al.* Answer of Geo. E. Downs. Filed Feb'y 2, 1891. C. Dart, clerk. Rouse & Grant, solicitors.

Replication to Answer of Charles Dillingham.

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

THE FARMERS' LOAN AND TRUST COMPANY, Complainants, *vs.* THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY and Others, Defendants.	}	In Equity. Ch. 227.

Complainant's replication to separate answer of Charles Dillingham.

This repliant, saving and reserving to itself all, and all manner of advantage of exception to the manifold insufficiencies of the said separate answer of Charles Dillingham, for replication there-
51 unto saith, that it will aver and prove its said bill to be true, certain, and sufficient in law to be answered unto; and that

the said separate answer of the said Charles Dillingham is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said separate answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is, and will be, ready to aver and prove, as this honorable court shall direct; and humbly prays, as in and by its said bill it hath already prayed.

TURNER, McCLURE & ROLSTON,
WILLIE, MOTT & BALLINGER,
Solicitors for Complainant.

Indorsements: No. 227. Equity. U. S. cir. court, east dist. Tex. Farmers' Loan and Trust Co. *vs.* H. & T. C. R'y Co. *et al.* Replication to answer of Dillingham. Filed Dec'r 20, 1889. C. Dart, clerk.

United States Circuit Court, Eastern District of Texas, at Galveston.

THE FARMERS' LOAN AND TRUST COMPANY *vs.* THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY, Charles Dillingham, Receiver, and George E. Downes. } No. 227.

Replication of The Farmers' Loan and Trust Company, Complainant, to the Separate Answer of George E. Downes.

This repliant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant, George E. Downes, for replication thereto, saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the
52 said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays, as in and by its said bill it hath already prayed.

TURNER, McCLURE & ROLSTON AND
WILLIE, MOTT & BALLINGER,
Solicitors for Complainant.

Indorsements: No. 227. Equity. The Farmers' Loan & Trust Co. *vs.* Houston & Texas Central R'y Co. *et al.* Replication of pl'ff to answer of George E. Downes. Filed Feb'y 13th, 1891. C. Dart, clerk.

Final Decree.

At a regular term of the circuit court of the United States, for the eastern district of Texas, held at the court-rooms, in the city of Galveston, on the 16th day of March, 1892.

Present: The Honorable Don A. Pardee, circuit judge; D. E. Bryant, district judge.

THE FARMERS' LOAN AND TRUST COMPANY, Complainant, *vs.* THE HOUSTON AND TEXAS CENTRAL RAILway Company, Charles Dillingham, and George E. Downs, Defendants. } In Equity. No. 227.

This cause came on to be heard at this term upon the pleadings and proof, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows:

I.

It is adjudged and decreed that the mortgage set forth in the bill of complaint made by the Houston & Texas Central Railway Company to the complainant, The Farmers' Loan and Trust Company, bearing date the 16th day of June, 1873, is a valid and sub-
53 sisting mortgage, and constitutes a first lien upon the mortgaged premises, property, lands and franchises described in said mortgage as follows:

All and singular the railway of the Houston and Texas Central Railway Company, known as the Waco and Northwestern division, built and to be built, beginning at a point on the main line of the Houston and Texas Central railway, passing through the city of Waco, in McLennan county, to the Red river, and thence to the northern boundary line of the State, together with all side-tracks, turnouts, rolling stock, equipment and material, all right of way and tracks, depot and shop grounds, tenements, hereditaments, rights and franchises, including and meaning to include all the property, real and personal, now acquired or which may hereafter be acquired by the said company in the State of Texas, pertaining to the operation of said division, and also all and singular six thousand acres of land per mile of completed road to the said division, said lands to be selected from the ten thousand two hundred and forty (10,240) acres of land per mile of completed road, donated by the State of Texas to aid in the construction of the said Waco and Northwestern railroad, as in said mortgage specified.

II.

Also, that there has been issued under the provisions of said mortgage, one thousand one hundred and forty bonds for one thousand dollars each, with interest coupons attached, and that there are now outstanding of said issue 1,096 bonds, 44 having been hereto-

fore taken up and paid by the trustee with the interest coupons thereon falling due after July 1st, 1891; and that said bonds so outstanding, together with the coupons on said 44 bonds redeemed, as aforesaid, due prior to the 1st day of July, 1891, are secured by a first lien upon all of said property. That there *is* outstanding the following coupons upon said bonds past due and unpaid upon which are due the following sums, viz:

(1.) The amount of $39,900 for coupons due January 1, 1886, with interest at the rate of six per centum per annum from that date.

54 (2.) The amount of $39,900 for coupons due July 1, 1886, with interest at like rate from that date.

(3.) The amount of $39,900 for coupons due January 1, 1887, with interest at like rate from that date.

(4.) The amount of $39,900 for coupons due July 1, 1887, with interest at like rate from that date.

(5.) The amount of $39,900 for coupons due January 1, 1888, with interest at like rate from that date.

(6.) The amount of $39,900 for coupons due July 1, 1888, with interest at like rate from that date.

(7.) The amount of $39,900 for coupons due January 1, 1889, with interest at like rate from that date.

(8.) The amount of $39,900 for coupons due July 1, 1889, with interest at like rate from that date.

(9.) The amount of $39,900 for coupons due January 1, 1890, with interest at like rate from that date.

(10.) The amount of $39,900 for coupons due July 1, 1890, with interest at like rate from that date.

(11.) The amount of $39,900 for coupons due January 1, 1891, with interest at like rate from that date.

(12.) The amount of $39,900 for coupons due July 1, 1891, with interest at like rate from that date.

(13.) The amount of $38,260 for coupons due January 1, 1892, with interest at like rate from that date.

(14.) The amount of $1,096,000 for principal of said bonds not yet due with interest coupons thereon from January 1, 1892. Making the amount due for interest up to March 15th, 1892, the sum of $618,982.75 and the further amount of $1,112,900 owing upon the unmatured bonds.

III.

Also, that by a decree of foreclosure and sale in consolidated cause No. 198, in equity, on the docket of this court, wherein Nelson S. Easton and James Rintoul, trustees, and The Farmers' Loan and Trust Company, trustee, were complainants, and The Houston and Texas Central Railway Company and others were defendants, entered by the court on the 4th day of May, 1888, the property, premises and franchises covered by the mortgage set out and described in the bill of complainant herein, were ordered sold subject to the first lien of complainant; and that at said sale the property

55 of every kind and description covered by said mortgage was purchased by the defendant, George E. Downs, and a deed

thereof was made and delivered to him. That the purchase so made by said Downs was made subject in all respects to the lien of complainant's mortgage on said property, and that in said deed it is expressly stated that the same was made subject in all respects to the said lien.

IV.

Also, that the property covered by said mortgage consists of the railway of the Houston and Texas Central Railway Company, beginning at a point on the main line of said railway company in the town of Bremond, in Robertson county, Texas, passing through the county of Falls and running to the town of Ross, in McLennan county, in said State, a distance of about fifty-eight miles, together with all side tracks, turnouts, rolling stock, equipment and materials, all right of way and tracks, depot and shop grounds, tenements, hereditaments, rights and franchises including all the property, real and personal, pertaining to the operation of the said fifty-eight miles of railway, and including the franchise to build to the Red river, and thence to the northern boundary line of said State; and also about 277,230 acres of land, donated by the State of Texas, in aid of the construction of said railway.

V.

It is further ordered and decreed that unless the defendant, George E. Downs, shall, on or before the expiration of thirty days from the entry of this decree, pay into the registry of this court for the use and benefit of the holders of the unpaid coupons secured by the mortgage aforesaid, dated the 16th day of June, 1873, the following sums, namely:

(1.) A sufficient sum of money to pay the costs of complainant in this cause as they shall be taxed and its compensation and counsel fees, as fixed by this court, and (2) the amount of the unpaid coupons due on said mortgage bonds, as aforesaid, all as hereinbefore stated, then the said mortgaged premises shall be sold as hereinafter directed and all right and equity of redemption of the defend-
56 ants, in and to the said mortgaged premises, property, rights, assets and franchises, and every part and parcel thereof, shall be forever barred and foreclosed.

VI.

It is further ordered and decreed that if default be made in making either of said payments within thirty days, then all the said mortgaged premises and property, real, personal and mixed, rights and franchises wherever situated, shall be sold in the manner and upon the terms hereinafter described. The railway, side tracks, turnouts rolling stock, equipment and materials, all right of way and tracks, depot and shop grounds, tenements, hereditaments, rights and franchises, including all real and personal property pertaining to the operation of said railway, and said lands donated by the State of Texas, including the franchise to build to the Red river and thence to the northern boundary of the State of Texas, shall be sold as an

entirety. Said sale shall be for cash and for the further considerations set forth in the XIV paragraph of this decree and without appraisement or right of redemption, at public auction, to the highest bidder therefor, at twelve o'clock noon, at the front door of the United States court-house, in the city of Waco, in the State of Texas, on a day to be named by the master commissioner herein appointed in his notice of sale. Before making said sale the master commissioner shall publish notice thereof in some newspaper of general circulation in each of the following cities, namely, in the city of New York, in the State of New York, and in the city of Waco, in the State of Texas. Said notice shall be published once in each week for eight weeks; the first publication shall be at least eight weeks before the day of sale, and the notice shall state the time, place and terms of sale, and shall contain a brief description of the property and premises hereby ordered to be sold. The master commissioner making such a sale may either personally or by some person to be designated by him and to act in his name and by his authority, and at the joint request of complainant and the defendant, George E. Downs, adjourn the sale from time to time, without further advertisement, but only on said joint request or by order of the court or a judge thereof.

57 VII.

The said master commissioner shall not receive a bid for such property from any person or party unless he or it shall, at or prior to the time of making such bids, deposit or have deposited with the said master commissioner the sum of $100,000, or a duly certified check satisfactory to the said master commissioner for such amount as the bidder's deposit.

Upon such property being struck off by the said master commissioner to any such bidder at such sale, the said sum of $100,000, or such certified check so deposited by such bidder, shall be held by said commissioner to the credit of this cause, subject to the order of this court therein.

Any and all deposits made by bidders or intended bidders at such sale, to whom the property may not have been struck off thereat, shall forthwith upon the striking off of the property to another bidder, or at the adjournment of the sale without striking off the property to any bidder, be returned to the depositor thereof. If any sale for which a deposit is made as aforesaid shall not be confirmed by the court, such deposit shall be returned to the bidder. In addition to the bidder's deposit so made by the purchaser at or prior to the time of bidding, such further portions of the purchase price of the property shall be paid in cash and deposited subject to the order of this court as the court in this cause may from time to time direct—the court reserving the right to resell in this cause the premises and properties herein directed to be sold upon the failure of the purchasers thereof, or their successors or assigns, to comply within twenty days with any order of the court in that regard; and in case of any resale or the failure of the purchaser or purchasers to comply with the terms of the bid or the orders of the court rela-

tive to such additional partial payments as may from time to time be directed, all sums deposited or paid in by such purchaser or purchasers shall be forfeited as a penalty for such non compliance. The balance of the purchase price may be paid either in cash or in the bonds, or the overdue coupons secured by the mortgage—each such bonds and coupons being received for such sums as the holder
58 thereof would be entitled to receive under the distribution herein ordered.

VIII.

It is further ordered, the parties consenting thereto, and convenience being thereby subserved and expenses diminished, that Christopher Dart be and he is hereby designated and appointed as master commissioner to make the sale hereby ordered and decreed, and to execute and deliver a deed of conveyance of the property so to be sold to the purchaser or purchasers thereof, on the order of the court, or a judge thereof confirming such sale. The court reserves the right, however, in term time or at chambers to appoint another person such master commissioner with like powers, in case of the death or disability to act of the master commissioner hereby designated, or in case of his resignation, or failure to act, or removal by the court.

IX.

It is further ordered and decreed that within thirty days from the confirmation of said sale, or such further time as the court may allow on the application of the purchaser or purchasers, for good cause shown, the purchaser, or purchasers of said property shall complete payment of the entire amount of the bid to the said master commissioner; on such payments, the said purchaser or purchasers shall be entitled to receive a deed of conveyance thereof from the master commissioner and from the other parties to this suit as herein provided, and to receive the possession of the property so purchased from the defendants, George E. Downs and Charles Dillingham, receiver, who shall thereupon make delivery of the same. On such payment being made the master commissioner shall publish for ten days in some newspaper published in the city of New York a notice fixing the time when and the place where he will be ready to pay the said mortgage bonds, or coupons entitled to be paid out of the proceeds of sale.

X.

It is further ordered and decreed that the fund to arise from said sale shall be applied as follows:

59 (1.) To the payment of such portion of the costs of this suit as this court or a judge thereof may subsequently determine, and also to the compensation of the complainant herein for its services, charges and expenses in the execution of its trust, including its own compensation, and its disbursement, expenses and charges for solicitors' and counsel fees in the execution of its said trust; also the compensation of the receivers and his counsel and

all proper expenses attendant upon the sale of the property, including the compensation of the commissioner making such sale, all of which charges and expenses shall be thereafter fixed and allowed by the court, or a judge thereof.

(2.) To the payment of the said mortgage coupons, and interest thereon to the amounts hereinbefore specified, or if the funds be not sufficient to pay the same, then the said said coupons with interest thereon shall be paid *pro rata.*

(3.) To the payment of the unmatured bonds and interest thereon, or if the fund be not sufficient to pay the same in full, then the said bonds with interest thereon shall be paid *pro rata.* Each of the said bonds and coupons presented to him shall be stamped by the said master commissioner so as to show the amount that has been paid on same, and on account of the coupon interest due thereon, and returned so stamped to the holder thereof. In case of payment in full of said bonds and coupons with interest thereon, the same shall be delivered with payment in full stamped thereon by the master commissioner to the purchaser as a muniment of title.

(4.) If, after making all of the above payments, there shall be any surplus, the same shall be paid according to the further order of the court in that regard.

XI.

It is further ordered and decreed that the defendant, George E. Downs, and the complainant, The Farmers' Loan and Trust Company, and each of them, be and they are hereby authorized and directed to execute and deliver under the direction of the master commissioner conveyances executed by the said parties respectively by way of conformation and further assurance of title to the
60 said purchaser or puchasers, his, its or their assigns, of all and singular the mortgaged property and premises and every part or parcel thereof of every kind and description and wherever situated, herein directed to be sold by the master commissioner. The forms of said conveyance and the mode of execution shall be settled and approved by the master commissioner, or by the court, if any question should arise as to the form or sufficiency thereof, and such conveyance shall be delivered to such purchaser, or purchasers, his, its or their assigns, contemporaneously with the deed or deeds of the master commissioner.

XII.

It is further ordered and decreed that without any further application or petition, John G. Winter, Esq., the special master in chancery herein, is directed to examine as soon as possible and report to the court on or before the rule day in August, 1892, the compensation to be allowed to the complainant and its counsel and solicitors, to the receiver in this cause and his counsel, and to the master commissioner, and in making these examinations he shall hold sittings in Texas, and may also hold sittings in New York, as the convenience of the parties and the master may require.

XIII.

It is further ordered and decreed that when delivery is made by the receiver of the property herein ordered to be sold to the purchaser or purchasers, he shall pass his final accounts before the special master.

XIV.

It is further ordered and decreed that the purchaser or purchasers of the property herein and hereby ordered to be sold shall be vested with and shall hold, possess and enjoy the said mortgaged premises, privileges and franchises appurtenant thereto as fully and completely as the said George E. Downs, defendant herein, now holds or enjoys, or at the time of the commencement of this suit held and enjoyed, or is or was entitled to hold or enjoy; and further, that the purchaser or purchasers shall have and be entitled to hold
61 said railroad and property free and discharge- from the claims of all parties to this suit. And the purchaser or purchasers of said property at said sale shall, as a part of the consideration of the purchase, and in addition to the sum bid, take the property upon the express condition that he or they will pay off, satisfy and discharge any and all claims and interventions now pending and undetermined in this court, accruing prior to the appointment of the receiver herein or during the receivership, which may be allowed and adjudged by this court as prior in right to complainant's mortgage, together with such interest as may be allowed; and also upon the further express conditions that he or they will pay off, satisfy and discharge all debts, claims and demands of whatsoever nature incurred or which may hereafter be incurred by said receiver, Charles Dillingham, and which have not been or shall not hereafter be paid by said receiver or other parties in interest herein; and said purchaser or purchasers, their successor or successors, or assigns, shall also have the right to appear and make defence to any claim, debt or demand sought to be enforced against said property; and said purchaser or purchasers, their successor or successors, or assigns, shall also have the right to appear and make defence to any claim, debt or demand pending and undetermined at the date of the confirmation of such sale. All claims, debts and demands accruing during the receivership herein shall be barred unless presented by intervention in this cause within six months after the confirmation of said sale; and jurisdiction of this cause is retained by this court for the purpose of enforcing the provisions of this article of this decree.

And it is further ordered, adjudged and decreed that it be recited in the deed to be executed and delivered to said purchaser or purchasers, that he or they do take said property, subject to, and that said purchaser or purchasers do assume and agree to pay off any and all debts, claims, and demands of whatsoever nature now pending and undetermined, and which may be allowed and adjudged by this court, as prior to any right secured under complainant's mortgage, and subject likewise to all debts, claims and demands of what-

soever nature incurred by Charles Dillingham as receiver in
62 this cause, and which may remain unpaid at the termination of said Dillingham's receivership, provided the same be presented, as hereinbefore provided, within six months after the confirmation of said sale.

XV.

It is further ordered, adjudged and decreed that the rights of the Lackawanna Coal and Iron Company, the Southern Development Company, the Pacific Improvement Company, and the Morgan's Louisiana & Texas Railroad and Steamship Company, intervenors herein, and the rights of all other intervenors herein be and they are hereby reserved to be hereinafter adjudicated, and are in no manner affected or prejudiced by this decree. It is further ordered that the disposition of any surplus funds arising from the earnings of the road, or otherwise, that may be in the hands of the receiver, is reserved for future determination.

XVI.

And it is further ordered, adjudged and decreed, that any party to this cause, and also any intervening petitioner who has filed his petition herein, and also the receiver, may at any time apply to this court for further relief at the foot of this decree, as well as for such modifications thereof in respect to the distribution of the proceeds of sale as equity may require.

In open court this 16th day of March, A. D. 1892.

DON A. PARDEE,
Circuit Judge.
DAVID E. BRYANT,
Dist. Judge.

Indorsements: No. 227. Equity. The Farmers' Loan and Trust Company, trustee, *vs.* The Houston & Texas Central Railway Co. *et al.* Final decree. Filed March 16th, 1892. C. Dart, clerk. A true copy.

Petition to Amend Final Decree and Order Thereon. Filed May 16, 1892.

THE FARMERS' LOAN AND TRUST COMPANY, Complainants,
vs.
HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY, CHARLES Dillingham, and George E. Downs, Defendants.

63 In the Circuit Court of the United States for the Eastern District of Texas, at Galveston. In Equity.

The petition of The Farmers' Loan & Trust Company, complainant herein, respectfully represents that by the 7th clause of the final decree of foreclosure, rendered herein on the 16th day of March, 1892, it was provided that no person should make a bid at the sale unless at or prior to the time of making such bid he should deposit

or have deposited with the said master commissioner the sum of one hundred thousand ($100,000) dollars, or a duly certified check therefor, satisfactory to said master commissioner.

That by the terms of said decree any party to this cause has the right to apply for further relief at the foot thereof.

That the requirement of said section 7 is a hardship in that no person can make a bid unless such deposit shall have been first made. And your petitioner says that this will have the effect of preventing a competition at the sale. That either to procure certified check, or the cash amounting to one hundred thousand ($100,000) dollars will entail expense and trouble, for which the bidder will not be reimbursed if the property is not adjudged to him. That the safeguards for the purpose of preventing improvident bids will be fully accomplished if the amount is reduced, which will in the opinion of petitioner encourage competition at the sale.

The premises considered, the petitioner prays that the said section 7 of the said final decree be so amended as to allow the master commissioner to receive bids upon a deposit of twenty-five thousand ($25,000) dollars, being made either in cash or by duly certified check. And petitioner further says that if in the opinion of the court it should be necessary to further protect the property from improvident bids it suggests that a further deposit of twenty-five thousand ($25,000) dollars shall be made by the party to whom the property is struck off before the sale shall be confirmed.

And petitioner prays for such other and further relief in the premises as in equity it may be entitled.

64 *Order.*

This cause came on to be heard this 14th day of May, 1892, before Don A. Pardee, circuit judge, and was argued by M. F. Mott, Esq., for complainant, and Wm. Grant for defendants, whereupon the court considering the foregoing petition, and being fully advised in the premises, it is further adjudged and decreed that section 7 of the final decree entered in this cause on the 16th day of March, 1892, be amended so as to read as follows:

VII.

The said master commissioner shall not receive a bid for such property from any person or party unless he or it shall at or prior to the time of making such bid deposit or have deposited with the said master commissioner the sum of $25,000 or a duly certified check satisfactory to the said master commissioner for such amount as the bidders deposit.

Upon such property being struck off by the said master commissioner to any such bidder at such sale, the said sum of $25,000, or such certified check so deposited by such bidder, shall be held by said commissioner to the credit of this cause, subject to the order of this court therein.

Any and all deposits made by bidders or intended bidders at such

sale, to whom the property may not have been struck thereat, shall forthwith upon the striking off of the property to another bidder, or at the adjournment of the sale without striking off the property to any bidder, be returned to the depositor thereof. If any sale for which a deposit is made as aforesaid shall not be confirmed by the court, such deposit shall be returned to the bidder. In addition to the bidder's deposit so made by the purchaser at or prior to the time of the bidding, such further portions of the purchase price of the property shall be paid in cash and deposited subject to the order of this court as the court in this cause may from time to time direct, the court reserving the right to resell in this cause the premises and properties herein directed to be sold upon the failure of the purchasers thereof or their successors or assigns to comply within twenty days
65 with any order of the court in that regard; and in case of any resale or the failure of the purchaser or purchasers to comply with the terms of the bid or the orders of the court relative to such additional partial payments as may from time to time be directed, all sums deposited or paid in by such purchaser or purchasers shall be forfeited as a penalty for such con compliance. The balance of the purchase price may be paid either in cash or in the bonds or the overdue coupons secured by the mortgage —each such bonds and coupons being received for such sums as the holder thereof would be entitled to receive under the distribution herein ordered.

DON A. PARDEE,
Circuit Judge.

Indorsements: "No. 227. Equity. The Farmers' Loan and Trust Co. *vs.* The Houston & Texas Central Railway Co. *et al.* Petition to amend final decree and order thereon. Filed May 16, 1892. C. Dart, clerk."

Order Amending Final Decree. Filed May 16, 1892.

United States Circuit Court, Eastern District of Texas. (At Chambers.)

FARMERS' LOAN AND TRUST COMPANY
vs.
THE HOUSTON AND TEXAS CENTRAL RAILWAY CO., GEO. E. DOWNS, *et al.* } No. 227.

It appearing to the court that there was error in the final decree of the court rendered herein on the 16th day of March, 1892, as to the amount due complainant, it is now ordered, all parties in interest assenting thereto, that the second clause of said decree be and the same is amended so as to read as follows:

II.

Also, that there has been issued under the provisions of said mortgage one hundred and forty bonds of one thousand dollars each, with interest coupons attached, forty-four of which, with the

interest coupons thereto, have heretofore been taken up
66 and paid by the trustee; and that of said bonds there are now outstanding 1,096, which, with the interest due thereon, are secured by a first lien upon all said property. That there *is* now due upon outstanding, past-due and unpaid coupons of said 1,096 bonds, and upon said bonds, the following sums, to wit:

1.	The amount of $38,360 for coupons due January 1, 1886, with interest at the rate of six per cent. per annum from that date.....	$38,360 00
2.	The amount of $38,360 for coupons due July 1, 1886, with interest at like rate from that date..	38,360 00
3.	The amount of $38,360 for coupons due January 1, 1887, with interest at like rate from that date..	38,360 00
4.	The amount of $38,360 for coupons due July 1, 1887, with interest at like rate from that date..	38,360 00
5.	The amount of $38,360 for coupons due January 1, 1888, with interest at like rate from that date..	38,360 00
6.	The amount of $38,360 for coupons due July 1, 1888, with interest at like rate from that date..	38,360 00
7.	The amount of $38,360 for coupons due January 1, 1889, with interest at like rate from that date..	38,360 00
8.	The amount of $38,360 for coupons due July 1, 1889, with interest at like rate from that date..	38,360 00
9.	The amount of $38,360 for coupons due January 1, 1890, with interest at like rate from that date..	38,360 00
10.	The amount of $38,360 for coupons due July 1, 1890, with interest at like rate from that date..	38,360 00
11.	The amount of $38,360 for coupons due January 1, 1891, with interest at like rate from that date..	38,360 00
12.	The amount of $38,360 for coupons due July 1, 1891, with interest at like rate from that date..	38,360 00
67		
13.	The amount of $38,360 for coupons due January 1, 1892, with interest at like rate from that date.....	38,360 00
14.	The sum of $15,983.33 for accruing interest on the amount of said 1,096 bonds from January 1st, 1892, to March 15, 1892....	15,983 33
15.	The amount of $1,096,000 owing on said 1,096 bonds not yet due..	1,096,000 00
16.	Making in all:	
	For past-due coupons and interest thereon.....	594,675 90
	For accruing interest on the principal of said bonds from January 1, 1892, to March 15, 1892.....	15,983 33
	For principal of said bonds...	1,096,000 00
		$1,706,659 23

Done and signed this 14th day of May, 1892.

DON A. PARDEE,
Circuit Judge.

Indorsements: "No. 227. Equity. The Farmers' Loan and Trust Co *vs.* The Houston and Texas Central Railway Co. *et al.* Order amending final decree. Filed May 16, 1892. C. Dart, clerk. A true copy.

Master Commissioner's Report of Sale.

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

THE FARMERS' LOAN AND TRUST COMPANY, Complainant, *vs.* THE HOUSTON AND TEXAS CENTRAL RAILWAY Company, Charles Dillingham, and George E. Downs, Defendants. } No. 227. Equity.

To the honorable the judges of said court:

The undersigned master commissioner, duly appointed by the decree in said cause, entered on the 16th day of March, 1892,
68 at the regular March term of said court, in the city of Galveston, Texas, begs leave respectfully to report:

That in accordance with said decree, he caused notices to be published in the "Evening Post," a daily newspaper published in the city of New York, and in the "Waco Daily Globe," and in the "Waco Daily Day and Globe," successor to the "Waco Daily Globe," newspapers of general circulation, published respectively in the city of New York, and in the city of Waco, in the State of Texas, a notice that he would, on the 28th day of December, 1892, or the day to which he might adjourn the said sale, at 12 o'clock, noon, at the front door of the United States court-house, in the city of Waco, in the State of Texas, make sale at public auction, to the highest bidder therefor, of all the mortgaged premises and property, real, personal and mixed, rights and franchises, wherever situated, mentioned in said decree and thereby directed to be sold, viz:

"The railway of the Houston and Texas Central Railway Company, beginning at a point on the main line of said railway company in the town of Bremond, in Robertson county, Texas, passing through the county of Falls, and running to the town of Ross, in McLennan county, in said State, a distance of about fifty-eight (58) miles, together with all side tracks, turnouts, rolling stock, equipment and materials, all right of way and tracks, depot and shop grounds, tenements, hereditaments, rights and franchises, including all the property, real and personal, pertaining to the operation of the said fifty-eight (58) miles of railway, and including the franchise to build to the Red river, and thence to the northern boundary line of said State. And, also, about two hundred and seventy-seven thousand, two hundred and thirty (277,230) acres of land, donated by the State of Texas in aid of the construction of said railway."

The said notices further gave notice that the said property would be sold in the manner and upon the terms hereinafter described, viz:

The railway, side tracks, turnouts, rolling stock, equipment and materials, all right of way and tracks, depot and shop grounds, tenements, hereditaments, rights and franchises, including all
69 real and personal property pertaining to the operation of said railway, and said lands donated by the State of Texas, including the franchise to build to the Red river, and thence to the northern boundary of the State of Texas, would be sold as an entirety. That the said sale would be for cash, and for the further considerations hereinafter stated, and without appraisement or right of redemption.

Reference was also made in said notices that for further details of the respective properties to be sold, reference was made to said decree and the schedules on file with the clerk of said court, at Galveston, Texas, subject to the inspection of all intending bidders at such sale.

Said notices further gave notice that in addition to the bidder's deposit of twenty-five thousand ($25,000.00) dollars, required in said decree to be made by the bidder with the master commissioner before the bid of such bidder should be received, the purchaser at, or prior to the time of the bidding, such further portions of the purchase price of the property should be paid in cash, and deposited subject to the order of this court, as the court in this cause might from time to time direct, the court reserving the right to resell, in this cause, the premises and properties in said decree directed to be sold, upon the failure of the purchasers thereof, or their successors or assigns, to comply within twenty (20) days with any order of the court in that regard, and in case of any resale, or the failure of the purchaser or purchasers to comply with the terms of the bid, or the orders of the court relative to such additional partial payments, as might from time to time be directed, all sums deposited or paid in by such purchaser or purchasers should be forfeited as a penalty for such non-compliance. That the balance of the purchase price might be paid either in cash or in the bonds, or the overdue coupons secured by the mortgage, each such bonds and coupons being received for such sums as the holder thereof would be entitled to receive under the distribution herein ordered.

That within thirty (30) days from the confirmation of such sale, or such further time as the court might allow on the application of the purchaser or purchasers for good cause shown, the purchaser or purchasers of said property shall complete payment of the
70 entire amount of the bid to the said master commissioner; on such payment the said purchaser or purchasers should be entitled to receive a deed of conveyance for the property sold from the master commissioner, and from the other parties to this suit, as provided in said decree, and to receive the possession of the property so purchased from the defendants, George E. Downs and Charles Dillingham, receiver, who shall thereupon make delivery of the same.

That the purchaser or purchasers of the property in said decree ordered to be sold, shall be vested with, and shall hold, possess and enjoy the said mortgaged premises, privileges and franchises appurtenant thereto, as fully and completely as the said George E. Downs,

defendant herein, now holds or enjoys, or at the time of the commencement of this suit held and enjoyed, or is or was entitled to hold or enjoy; and, further, that the purchaser or purchasers shall have and be entitled to hold said railroad and property, free and discharged from the claims of all parties to this suit.

And that the purchaser or purchasers of said property at said sale shall, as a part of the consideration of the purchase and in addition to the sum bid, take the property upon the express condition that he or they will pay off, satisfy and discharge any and all claims and interventions now pending and undetermined in this court accruing prior to the appointment of the receiver herein, or during the receivership which may be allowed and adjudged by this court as prior in right to complainant's mortgage, together with such interest as may be allowed; and, also, upon the further expressed conditions that he or they will pay off, satisfy and discharge all debts, claims and demands of whatsoever nature incurred, or which may hereafter be incurred by said receiver, Charles Dillingham, and which have not been, or shall not hereafter be paid by said receiver or other parties in interest herein.

The said notices further contain the provision that it shall be recited in the deed to be executed and delivered to said purchaser or purchasers, that he or they do take said property subject to, and that said purchaser or purchasers do assume and agree to pay off any and all debts, claims and demands of whatsoever nature now pending and undetermined, and which may be allowed and adjudged by this court as prior to any right secured under complainant's mortgage, and subject, likewise, to all debts, claims and demands of whatsoever nature incurred by Charles Dillingham as receiver in this cause, and which may remain unpaid at the termination of said Dillingham's receivership, provided the same be presented, as provided in said decree, within six (6) months after the confirmation of said sale.

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The said notices further contained a recital that the rights of The Lackawanna Iron and Coal Company, The Southern Development Company, The Pacific Improvement Company, and The Morgan's Louisiana and Texas Railroad and Steamship Company, intervenors herein, and the rights of all other intervenors herein are reserved to be hereinafter adjudicated, and are in no manner affected or prejudiced by said decree.

The said notices were published in said newspapers once a week for eight (8) weeks, and the first publication in each of said papers was made at least eight (8) weeks before the day appointed for said sale, to wit: the 28th day of December, 1892.

Copies of said notices so published in said newspapers are hereunto annexed, and marked respectively "A" and "B," and are made part of this report of sale.

The said master commissioner further begs leave to report that in accordance with said decree, and with the said notices, he attended, in the city of Waco, in the State of Texas, on the said 28th day of December, 1892, and at 12 o'clock, noon, the day and hour named in said notices, at the front door of the United States court-

house, in the said city of Waco, in the State of Texas, and made sale of all the mortgaged property, premises and franchises hereinbefore described, at public auction to the highest bidder for cash, and for the further considerations as set forth in said decree and in said notices; and at said sale, after crying the said property for a reasonable time, and receiving various bids therefor, the said master commissioner received a bid from E. H. R. Green for the sum of one million three hundred and seventy-five thousand dollars ($1,375,000),
72 which bid being the highest bid received from any person, after full and public notice given by said master commissioner at said sale, all of said property hereinbefore described was struck off to the said E. H. R. Green as the purchaser thereof, and the said E. H. R. Green was then and there publicly declared by said master commissioner the purchaser at said sale of all the property, premises and franchises hereinbefore described.

The said master commissioner further reports that in accordance with said decree, before receiving the bid of the said E. H. R. Green, or of the other parties bidding at said sale, to wit: L. Harrison, J. Kruttschnitt and William T. Gould, each of said persons deposited with said master commissioner a certified check for the sum of twenty-five thousand ($25,000.00) dollars. That immediately after said sale the certified checks deposited by the said William T. Gould, L. Harrison and J. Kruttschnitt were returned to them by the said master commissioner, and their receipts taken therefor. That the certified check deposited by the said E. H. R. Green was by said master commissioner deposited for collection, and the amount thereof, twenty-five thousand ($25,000.00) dollars, deposited with the assistant treasurer of the United States at New Orleans, La., to the credit of the said master commissioner in said cause, subject to the order of this court.

The said master commissioner begs leave respectfully to report that before any bids were received for said property Hon. George Clark, as attorney for the stockholders of the Waco and Northwestern Railway Company, their representatives and assigns, gave public notice as to the land granted by the State of Texas to said railway company, which notice is hereunto annexed, marked "C." Also, before said sale, E. A. McKenney, as attorney for T. M. Shirley *et al.*, also gave public notice at said sale in respect to a judgment alleged to have been recovered by the said T. M. Shirley, of and from the surviving trustees of the Waco & Northwestern Railroad Company, in the district court of McLennan county, Texas. The said notice is hereunto annexed, marked "D."

Respectfully submitted.

C. DART,
Master Commissioner.

73 "A."

Notice Published in "Evening Post."

Commissioner's sale.

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

THE FARMERS' LOAN AND TRUST COMPANY, Trustee, Complainant,
vs.
THE HOUSTON & TEXAS CENTRAL Railroad Company, Charles Dillingham, and George E. Downs, Defendants. } No. 227. Chancery Docket.

Notice is hereby given that, in pursuance of a decree entered in the above-entitled cause, on the 16th day of March, 1892, at the regular March term of said court, in the city of Galveston, Texas, I, the undersigned master commissioner thereby designated, shall on the 28th day of December, 1892, or the day to which I may adjourn such sale, at twelve o'clock noon, at the front door of the United States court-house, in the city of Waco, in the State of Texas, make sale at public auction to the highest bidder therefor, of all the mortgaged premises and property, real, personal and mixed, rights and franchises wherever situated, mentioned in said decree and thereby directed to be sold, viz:

The railway of the Houston and Texas Central Railway Company, beginning at a point on the main line of said railway company in the town of Bremond, in Robertson county, Texas, passing through the county of Falls, and running to the town of Ross, in McLennan county, in said State, a distance of about fifty-eight miles, together with all side tracks, turnouts, rolling stock, equipment and materials, all right of way and tracks, depot and shop grounds, tenements, hereditaments, rights and franchises, including all the property, real and personal, pertaining to the operation of the said fifty-eight miles of railway, and including the franchise to build to the Red river, and thence to the northern boundary line of said State; and also about two hundred and seventy seven thousand, two hundred and thirty (277,230) acres of land, donated by the State of Texas in aid of the construction of said railway.

The same will be sold in the manner and upon the terms hereinafter described, viz: The railway, side tracks, turnouts, rolling
74 stock, equipment and materials, all right of way and tracks, depot and shop grounds, tenements, hereditaments, rights and franchises, including all real and personal property pertaining to the operation of said railway, and said lands donated by the State of Texas, including the franchise to build to the Red river and thence to the northern boundary of the State of Texas, shall be sold as an entirety. Said sale shall be for cash, and for the fur-

ther consideration hereinafter stated, and without appraisement or right of redemption.

For further details of the respective properties to be sold reference is hereby made to said decree, and to schedules on file with the clerk of said court at Galveston, Texas, subject to the inspection of all intending bidders at such sale.

The master commissioner will not receive a bid for such property from any person, or party, unless he or it shall, at or prior to the time of making such bids, deposit, or have deposited, with the said master commissioner the sum of $25,000, or a duly certified check satisfactory to the said master commissioner for such amount as the bidder's deposit. Upon such property being struck off by the said master commissioner to any such bidder at such sale, the said sum of $25,000, or such certified check so deposited by such bidder shall be held by said commissioner to the credit of this cause, subject to the order of this court therein.

Any and all deposits made by bidders or intended bidders at such sale to whom the property may not have been struck off thereat, shall forthwith upon the striking off of the property to another bidder, or at the adjournment of the sale without striking off the property to any bidder, be returned to the depositor thereof.

If any sale for which a deposit is made as aforesaid shall not be confirmed by the court, such deposits shall be returned to the bidder. In addition to the bidder's deposit so made by the purchaser at or prior to the time of the bidding, such further portions of the purchase price of the property shall be paid in cash and deposited subject to the order of this court as the court in this cause may from time to time direct; the court reserving the right to re-
sell in this cause, the premises and properties herein directed
75 to be sold upon the failure of the purchasers thereof, or their successors or assigns, to comply within twenty days with any order of the court in that regard, and in case of any resale or the failure of the purchaser or purchasers to comply with the terms of the bid or the orders of the court relative to such additional partial payments as may from time to time be directed, all sums deposited or paid in by such purchaser or purchasers shall be forfeited as a penalty for such non-compliance. The balance of the purchase price may be paid either in cash or in the bonds, or the overdue coupons secured by the mortgage, each such bonds and coupons being received for such sums as the holder thereof would be entitled to receive under the distribution herein ordered.

Within thirty days from the confirmation of said sale, or such further time as the court may allow on the application of the purchaser or purchasers, for good cause shown, the purchaser or purchasers of said property shall complete payment of the entire amount of the bid to the said master commissioner; on such payments, the said purchaser or purchasers shall be entitled to receive a deed of conveyance thereof from the master commissioner and from the other parties to this suit as provided in said decree, and to receive the possession of the property so purchased from the defendants

George E. Downs, and Charles Dillingham, receiver, who shall thereupon make delivery of the same.

The purchaser or purchasers of the property herein and hereby ordered to be sold shall be vested with and shall hold, possess and enjoy the said mortgaged premises, privileges and franchises appurtenant thereto as fully and completely as the said George E. Downs, defendant herein, now holds or enjoys, or at the time of the commencement of this suit held and enjoyed, or is or was entitled to hold or enjoy; and further, that the purchaser or purchasers shall have and be entitled to hold said railroad and property free and discharged from the claims of all parties to this suit. And the purchaser or purchasers of said property at said sale shall as a part of the consideration of the purchase, and in addition to the sum bid,

take the property upon the express condition that he or they
76 will pay off, satisfy and discharge any and all claims and interventions now pending and undetermined in this court accruing prior to the appointment of the receiver, herein, or during the receivership, which may be allowed and adjudged by this court as prior in right to complainant's mortgage, together with such interest as may be allowed; and also upon the further express conditions that he or they will pay off, satisfy and discharge all debts, claims and demands of whatsoever nature, incurred, or which may hereafter be incurred, by said receiver, Charles Dillingham, and which have not been or shall not hereafter be paid by said receiver or other parties in interest herein.

It shall be recited in the deed to be executed and delivered to said purchaser or purchasers that he or they do take said property, subject to, and that said purchaser or purchasers do assume and agree to pay off, any and all debts, claims and demands of whatsoever nature now pending and undetermined, and which may be allowed and adjudged by this court, as prior to any right secured under complainant's mortgage, and subject likewise to all debts, claims and demands of whatsoever nature incurred by Charles Dillingham as receiver in this cause, and which may remain unpaid at the termination of said Dillingham's receivership, provided the same be presented as provided in said decree within six months after the confirmation of said sale.

The rights of The Lackawanna Iron and Coal Company, The Southern Development Company, The Pacific Improvement Company, and The Morgan's Louisiana and Texas Railroad and Steamship Company, intervenors herein, and the rights of all other intervenors herein, are reserved, to be hereinafter adjudicated, and are in no manner affected or prejudiced by said decree.

Galveston, Texas, October 25th, 1892.

C. DART, *Master Commissioner.*
TURNER, McCLURE & ROLSTON,
22 William Street, New York,
M. F. MOTT, *Galveston, Texas,*
Plaintiff's Attorneys.

77 "B."

Same notice published in "Waco Daily Globe," and in the "Waco Daily Day and Globe," successor to the "Waco Daily Globe."

"C."

To whom it may concern:

The stockholders of the Waco and Northwestern Railway Company, including The City of Waco, through their accredited representatives, hereby give public and formal notice, before sale by C. Dart, special master, that they (said stockholders) are the legal and equitable owners of all the lands granted by the State of Texas to said railway company, including the lands proposed to be now sold, which ownership they (said stockholders) intend to assert in the courts of the country; and that none of said lands belong, either at law or in equity, to the Houston and Texas Central Railway Company.

All parties, and especially such as may contemplate purchasing said lands at the present sale, are notified that no title to said lands will pass by said sale to any purchaser, and that suit will be entered at once against any purchaser, or his vendee or assignee, by said stockholders of the Waco and Northwestern Railway Company through their accredited representatives.

Waco, Texas, December 28th, 1892.

GEO. CLARK,
Att'y for the Stockholders of the Waco & Northwestern Railway Company, Their Representatives and Assigns.

"D."

As the attorney for T. M. Shirley, and others in interest, as plaintiff, I now give notice to purchasers of the Waco and Northwestern railroad, now known as the Waco and Northwestern branch of the Houston and Texas Central railway, at this pending sale of the same: That said T. M. Shirley recovered of and from the surviving trustees of said Waco & Northwestern Railroad Company, to which judgment the said Houston & Texas Central Railway Com-
78-564 pany is a party, on October 31, 1890, in the district court of McLennan county, Texas, a judgment aggregating then in amount one hundred and fifty-nine thousand eight hundred and seventy-one and $\frac{48}{100}$ ($159,871.48) dollars. Of which said sum $24,671.62 is an equitable mortgage on the road, road-bed, right of way, superstructure, &c., of said Waco & Northwestern railroad. And the remaining $135,199.86 is a judgment lien on said road, road-bed, right of way, superstructure, &c., of the Waco & Northwestern railroad, said cause numbered 1779 in said court.

And said judgment vacates, sets aside and nullifies the sale and transfer of said Waco & Northwestern railroad to the Houston & Texas Central Railway Company, made under a deed of trust executed by John T. Flint, as president of said Waco & Northwestern Railroad Company, to Gray & Botts, trustees, as to the rights of

T. M. Shirley, plaintiff, and orders the sale of said property to satisfy said judgment.

Said judgment is now pending on appeal by the Houston & Texas Central Railway Company and others, before the third division of the court of civil appeals, at Austin, Texas, but no supersedeas bond was given by appellant, and said judgment is not suspended or superseded by said appeal.

This judgment has not been heretofore or now enforced, because the property of said Waco & Northwestern Railroad Company has been, and is now, held by the U. S. circuit court at Galveston, Texas, through its receiver, at the time of its rendition and ever since, though execution or order of sale has issued from said district court of McLennan county, Texas, each year since said October 31, 1890.

Waco, Dec'r 28th, 1892.

E. A. McKENNEY,
For T. M. Shirley et al.

Endorsed: "No. 1779. T. M. Shirley *vs.* Waco Tap R'y Co. Notice to purchasers at sale under decree U. S. court, 1st bonds."

Indorsements: "No. 227. Equity. Farmers' Loan and Trust Co., trustees, *vs.* Houston and Texas Central Railway Co. *et al.* Master commissioner's report of sale. Filed January 11th, 1893. C. Dart, clerk, by Geo. H. Burnett, deputy."

565 *Order Appointing Alfred Abeel Receiver in Equity Cause No. 227.*

In the United States Circuit Court, Eastern District of Texas, Fifth Circuit, at Galveston.

THE FARMERS' LOAN AND TRUST COMPANY *vs.* THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY *et al.* } No. 227. In Equity.

Order.

Charles Dillingham, Esq., heretofore appointed receiver in this cause of all the property of the defendant company, having resigned as such receiver, and his resignation having been accepted,

It is ordered that Alfred Abeel, Esq., of Waco, Texas, be, and he is hereby appointed receiver in this case, and is required to give bond as such receiver in the sum of twenty thousand dollars, payable and conditioned as was required in the original order appointing a receiver in this case, with good and sufficient sureties, to be approved by the Hon. David E Bryant, United States district judge for the eastern district of Texas; and upon the giving of said bond, and its approval and filing with the clerk of this court at Galveston, said receiver Alfred Abeel shall have and exercise all the rights and powers, and discharge all the duties conferred and imposed by law and the previous orders of this court, in this case, on the receiver herein.

And no formal surrender of the custody or delivery of
566–571 possession of any property, funds, assets, books, vouchers or other thing held by the outgoing receiver shall be necessary, but this order shall operate to put said receiver Abeel in the lawful custody thereof, and all depositories, bailees, officers or employés having the actual custody of any of such property, funds, assets, books, vouchers or other thing held by said outgoing receiver as such, and all persons connected with the operation of the Waco and Northwestern railroad in any manner, shall hold the same for said receiver Abeel, and subject to his authorized directions and orders in reference thereto.

Said receiver Alfred Abeel, shall immediately cause to be made out a detailed statement and inventory of all the property and effects coming into his custody under this order, and make report thereof to the court. He shall also report fully the present condition of said railroad, the Waco, Northwestern, and its rolling stock, and other equipment. He shall make monthly returns of all the operations of said railroad under his charge to the court, filing the same with the clerk at Galveston.

Said receiver is required and is hereby ordered to pay into the registry of this court all the surplus funds now accumulated in the hands of the outgoing receiver, and by this order transferred to said Abeel as receiver, and the clerk shall forthwith deposit the same to the credit of this court in the United States subtreasury at New Orleans.

In chambers, December 6th, 1892.

A. P. McCORMICK,
Circuit Judge.

Indorsements: "No. 227. Equity. The Farmers' Loan and Trust Company, trustee, *vs.* The Houston and Texas Central Railway Company *et al.* Order appointing Alfred Abeel receiver. Filed Dec. 7th, 1892. C. Dart, clerk."

572 *Petition of Geo. E. Downs as to Funds and Order — Reference Thereon. Filed Oct. 22, '95.*

In the United States Circuit Court for the Eastern District of Texas.

THE FARMERS' LOAN & TRUST COMPANY
vs.
THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY, George E. Downs, *et al.* } No. 227.

To the honorable the judges of the United States circuit court for the eastern district of Texas:

The petition of George E. Downs, who has been impleaded and is a defendant in the above entitled cause, respectfully represents that by the eleventh clause of the original decree herein, of March 16th, 1892, and the tenth clause of the amended decree of March 5th, 1895, his right to claim the net earnings of the Waco & North-

western railway was reserved to him, and that said railway was sold under said decrees on the 3d day of September, 1895, and that this court is now in a position to finally determine said claims.

And now your petitioner, for the purpose of propounding his said claims, shows and avers to the court:

573 First. That he purchased said railway and the land grant belonging thereto and all appurtenances, on the 8th day of September, 1888, under the final decree in the case of Nelson S. Easton and James Rintoul, trustees, and The Farmers' Loan & Trust Company, trustee, No. 198, on the docket of this honorable court, subject to the mortgage foreclosed in this cause, but without assuming the payment of the mortgage debt, and paying therefor the sum of twenty-five thousand dollars ($25,000) in cash at the moment of adjudication, substantially as set forth in the complainant's bill herein, and became in law entitled to the possession and the revenues of the property from the date of his said purchase.

Second. That Charles Dillingham and Nelson S. Easton and James Rintoul remained in possession of said railway and appurtenances under appointment of this honorable court in said suit No. 198, as joint receivers from the date of your petitioner's purchase until December 7th, 1888, when the said Easton and Rintoul were discharged and said Charles Dillingham was continued therein as sole receiver and remained in possession of said railway under his said appointment until the bill in this cause was filed, on or about the 18th day of April, 1889, and your petitioner avers that the aforesaid possession of the said receivers was merely formal and continued for the purpose of closing up their trust and in the interest of and for the benefit of your petitioner as purchaser aforesaid. And petitioner avers that during said period said railway made large net earnings, exceeding in amount the sum of fifty thousand dollars ($50,000), which in law and equity belong to your petitioner as owner.

Third. Petitioner further shows that the receivership of said Charles Dillingham in said cause No. 198 continued until the bill in this case was filed, on or about the 18th day of April, 1889, when said Charles Dillingham was appointed receiver under the bill filed in this cause. And petitioner avers that at the time of such appointment the said Charles Dillingham had in his hands net earnings derived from the operation of said railway as aforesaid, which amount was taken up by him in his accounts as receiver in this cause and transferred to the present receiver, Alfred Abeel,

574 who now holds the same under the orders of this honorable court, or has deposited the same in the registry of the court, where it is under the orders of this court.

Fourth. Petitioner further shows that said railway has made large net earnings while operated by said receivers, since the date of the filing of the bill in this cause, the exact amount of which the petitioner cannot state, but exceeding, as your petitioner is informed and believes and so avers, the sum of two hundred and seventy-five thousand dollars ($275,000). And that said amount is in the registry of the court, or in the hands of the present receiver, Alfred

Abeel, subject to the control and disposition of this honorable court.

Fifth. Petitioner further shows that the complainant is not of right, nor by any stipulation contained in the mortgage foreclosed herein, nor by the decree of foreclosure, nor by any order or thing contained in the record of this cause entitled to have the said net revenues, or any part thereof, applied to the payment of the bonds and coupons secured by said mortgage; but, on the contrary, that said net earnings made before the filing of the bill in this case, and subsequent thereto, belong to your petitioner as owner of said railway and land grant, and should be ordered paid over to him.

Petitioner therefore prays that the court may be pleased to order an account to be taken of said net earnings before some suitable person to be appointed master herein for that purpose, and that said master may be directed to find and report specially: First, the net earnings of said railway made between September 8th, 1888, and the date of the filing of the bill in this case, and what portion thereof has come into the hands of the receivers appointed in this cause and what disposition has been made of the same; second, the net earnings made by said railway from the date of the filing of the bill in this case to the date of the sale of said railway, September 3rd, 1895; third, what portion of said earnings has been used for the permanent improvement and betterment of said railway by order of court during said period; fourth, the amount taken from said earnings and applied to the payment of costs and for other purposes by order of court, or otherwise; and that the court may be pleased to decree that said net earnings be paid over to your petitioner in accordance with his rights in the premises.

575–586

Petitioner further prays that an order be entered directing this petition to be heard upon a day to be fixed, after due notice to all parties in interest, and that the said earnings in dispute may be ordered retained in the registry of the court, or in the hands of the receiver, until this petition can be finally heard and determined; and petitioner prays for costs and all general relief in the premises.

GEORGE E. DOWNS,
By WM. GRANT,
His Solicitor.

Let the foregoing petition be filed and let the complainant and other parties in interest plead to the same within thirty days, and when at issue let the petition be referred to W. L. Prather, Esq., master, with directions — examine into the matter and find and report to the court the facts as specially prayed in said petition.

It is further ordered that the fund claimed by petitioner be retained until said petition can be heard and determined.

It is further ordered that the master file his report under this reference on or before the 1st Monday in January, 1896.

A. P. McCORMICK, *Cir. Judge.*
D. E. BRYANT, *Dist. Judge.*

Indorsements: "No. 227. Eq. Farmers' Loan and Trust Co. *vs.* Houston & Texas Central R'y Co. *et al.* Petition of Geo. E. Downs for order as to funds, etc. Filed Oct. 22, 1895. C. Dart, clerk."

587 Int. No. 78.

Master's Report on Petition of Geo. E. Downs, Intervenor.

Filed January 6, 1896.

THE FARMERS' LOAN AND TRUST COMPANY, Trustee,
vs.
THE HOUSTON & TEXAS CENTRAL RAILWAY Company *et al.*
} No. 227. In Equity.

588 Intervention of George E. Downs. Filed herein on October 22, 1895.

Master's No., 69.

Findings of Fact by Special Master Wm. L. Prather on Reference to Him of the Above Intervention.

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

To the honorable judges of said court:

George E. Downs, intervenor, filed his petition herein on October 22, 1895, and the same was referred to the master by order dated October 22, 1895, with directions to examine into the matter and find and report to the court the facts as specially prayed in said petition, leave being granted at the same time to complainant and other parties in interest to plead to said petition within thirty days from the date of said order, and the master being directed to file his report in said reference on or before the first Monday in January, 1896.

On November 16, 1895, the intervenors, Moran Brothers and Henry K. McHarg, filed their answer to the petition of George E. Downs before the master, and on November 25, 1895, the complainant filed its answer to said petition with the clerk of this court, and the same was filed before the master November 26, 1895.

After notice duly extended to all parties in interest said reference came on to be heard at the United States court-room in Galveston on December 4, 1895, when and where appeared Wm. Grant, Esq., solicitor for intervenor, M. P. Mott, Esq., solicitor for complainant, and L. W. Campbell, Esq., solicitor for Moran Brothers and Henry K. McHarg.

The evidence was heard in part at Galveston on December 4, 1895, and by agreement of all parties the hearing was adjourned to Houston, Texas, where on December 6, 1895, said hearing was concluded.

I file herewith the pleadings of the parties, the list of the evidence introduced, and a memorandum of the hearing at Galveston and Houston.

Upon consideration of the pleadings of the parties and the evidence I submit the following as my conclusions of fact:

589 I.

I find that the evidence fails to show any net earnings arising from the operation of the Waco & Northwestern division of the Houston & Texas Central Railway Company from the date of the intervenor's purchase of said division on September 8, 1888, to the filing of the bill in this cause on April 6, 1889, and it fails to show that either of the receivers in this cause have ever come into possession of any funds arising from the operation of said division during said period.

II.

I find that the earnings arising from the operation of the said Waco & Northwestern railway from April 6, 1889, the date of the filing of the bill in this cause, to September 3, 1895, the date of the sale, amount to $461,902.51. Included in said amount is $22,297.06 net land receipts. The gross amount of land receipts is $38,509.23, of which Alfred Abeel received $6,383.57 from Chas. Dillingham, former receiver, and of which said gross amount there was derived as rent from land leases the sum of $13,935.74, and from interest on land deposits the sum of $667.37, and from land notes the sum of $14,426.83, and from interest on land notes the sum of $2,971.49, and from land notes and interest since March 5, 1895, the date of final decree the sum of $124.23. There has been paid out of said gross amount of land receipts, taxes to the amount of $14,830.97, and for general land expenses the sum of $1,372.20.

III.

I find that $46,505.40 of said net income has been paid out by the receiver under orders of this court since April 6, 1889, up to September 3, 1895, for permanent improvements on the property and for betterments, as set forth in the tabulated statement furnished by the receiver in evidence before me, marked Exhibit T, herewith filed, and returned into court.

IV.

I find that $52,841.74 of said net income has been paid out
590 by the receiver under orders of this court, since April 6, 1889, to pay costs in this cause, attorney's fees and other court expenses as shown by said tabulated statement.

V.

I further find that of said net income, there remains in the hands of the receiver, or deposited in the registry of the court, the sum of $362,855.37, after deducting said disbursements, which is subject to the order of this court.

At the instance of the solicitor of intervenors, Moran Brothers and Henry K. McHarg, I make the following additional findings:

I.

I find that intervenor purchased the Waco & Northwestern division of the Houston & Texas Central Railway Company and its land grant under the decree of foreclosure entered in consolidated cause No. 198 on the docket of this court, and that such purchase was made on September 8, 1888, intervenor paying therefor $25,000.00, which was paid in cash by intervenor at the time of his said bid.

II.

I find that it is provided in the decree of foreclosure entered in said cause No. 198, under which the intervenor purchased, that the sale of the Waco and Northwestern division was sold in all things subject to the prior lien and mortgage given on said division by the Houston & Texas Central Railway Company on June 16, 1883, being the same mortgage declared on herein.

III.

I find that intervenor did in fact purchase said road in all things subject to said first mortgage, and that his said purchase was duly reported to this court by the master commissioner, and said sale was on December 4, 1888, in all things confirmed by this court, and deed was thereafter on the 18th day of January, 1889, made by the master commissioner and delivered to intervenor for said property.

591 IV.

I find that the complainant's mortgage declared on herein, being the same mortgage referred to above, contains the following provision: "And in case the said Houston & Texas Central Railway Company shall fail to pay the principal, or any part thereof, or any instalment of the interest or any part thereof, on any of the said bonds at any time when the same shall become due and payable, according to the tenor thereof, and for sixty days after having been demanded, it shall be competent for said trustee, its successors or assigns, to enter upon the said railway and the premises and property herein conveyed, by its attorneys and agents and take possession of the same without let or hindrance of the said first party, and every part and parcel thereof and the appurtenances, and appoint an agent to operate and manage the same, and receive the revenue and income thereof, applying the said fund after deducting taxes, necessary expenses and counsel fees to keep the same in good order and repair, and the surplus to pay the interest and principal of all the bonds which may be due and outstanding and secured hereby, *pro rata* and thereafter to the payment of any contributions due to the sinking fund herein established; and upon the request of the holders of one-fifth in amount of the bonds so in default, which may be at any time

outstanding under this deed of trust, it shall be the duty of said second party, by its president or agent duly appointed in its behalf to enter upon and take actual possession, with or without entry or foreclosure of said railway and property herein described, and all and singular each and every part and parcel thereof, and assume its management until the arrears of both principal and interest be paid, or the property sold as herein prescribed, receiving the rents, revenues and income thereof, and applying them in the same manner as above stated."

All of which is respectfully submitted.

WM. L. PRATHER,
Special Master.

Indorsements: "Int. No. 78. Farmers' Loan and Trust Company, trustee, *vs.* H. & T. C. R'y Co. *et als.* No 227. Eq. Geo. E. Downs, intervenor. Report of Wm. L. Prather, special master. Filed January 6, 1896. C. Dart, clerk, by Geo. H. Burnett, deputy."

592 ORIGINAL EXHIBIT T, Substituted by Corrected Statement, Marked "T." Filed January 6th, 1896.

Waco & Northwestern railroad—Alfred Abeel, receiver.

Statement.

Earnings to Aug. 31, 1895, as per sheet	$1,672,830 91	
Expenses to Aug. 31, 1895, as per sheet	2,368,254 19	
		$304,576 72

Income from Operation.

Court expenses as per sheet 3	$52,841 74	
Betterments " " " 4	46,505 40	
Total court expenses and betterments		99,347 14
Net income		$205,229 58

Receipts from other Sources.

From Chas. Dillingham, receiver	$100,000	
From Chas. Dillingham, receiver, balance	17,731 17	
From Chas. Dillingham, receiver, land act	6,383 57	
From land notes & leases	15,719 39	
From int. on land deposit	667 37	
From land notes collected since 3, 5, '95	124 23	
		$140,625 73
On hand and in registry Aug. 31, 1895		$345,855 31
Net earnings, Sept. 1 to 3, 1895, inclusive, as per sheet 5		526 01
		$346,381 32

593 Waco & Northwestern R. R., Dec. 3, 1895, auditor's office. Correct:

S. L. WERDEN,
Act'g Auditor.

Waco & Northwestern railroad—Alfred Abeel, receiver.

Earnings from Operations, Dec. 10, 1892, *to Aug.* 31, 1895.

Freight	137,053 56	
	29,109 06	
	3,891 65	
	230,796 77	
	89,980 04	
		490,831 08
Passenger	47,239 39	
	4,559 13	
	2,058 38	
	61,902 61	
	31,585 80	
		147,345 31
Mail	4,290 33	
	5,298 69	
	2,917 82	
	972 61	
		13,479 45
Baggage	756 01	
	634 96	
	313 65	
	86 12	
		1,790 74
Express	1,865 00	
	2,090 00	
	1,320 00	
		5,275 00
Rentals	3,743 33	
	4,369 34	
	2,720 00	
		10,832 67
594 Miscellaneous	32 00	
Int. on deposit	3,244 66	
		3,276 66
		$672,830 91

Correct:

S. L. WERDEN,
Act'g Auditor Waco & Northwestern R. R.

Dec. 3, 1895. Auditor's office.

(1.)

Waco & Northwestern railroad—Alfred Abeel, receiver.

Operating Expenses, Dec. 10, 1892, *to August* 31*st*, 1895.

Conducting transportation.....	77,864 81	
	72,366 10	
	31,524 93	
	9,881 04	
	180 36	
		191,817 24
Maintenance of way & structures.....	35,265 50	
	35,235 11	
	13,986 43	
	5,344 88	
		89,831 92
General expense.....	28,046 44	
	24,959 96	
	16,643 63	
		69,650 03
Maintenance of equipment	3,817 33	
	110 88	
	29 83	
	4,824 56	
	4,108 96	
	1,370 68	
		14,262 24
Taxes.....	420 83	
	9,661 58	
	391 33	
		10,473 74
Total expenses.....		376,035 17
595 Less court expenses charged herein by error as follows:		
Brooks & Wallace, printing court record.	149 75	
Clarke & Courts, printing court record..	732 75	
C. Dart, clerk, court costs.....	2,698 48	
E. H. Graham, all'ce as gen. att'y.....	4,200 00	
		7,780 98
		$368,254 19

Correct:

S. L. WERDEN,
Act'g Auditor Waco & Northwestern R. R.

Dec. 3, 1895. Auditor's office.

(2.)

Waco & Northwestern railroad—Alfred Abeel, receiver.

Paid for Court Expenses, Dec. 10, 1892, *to Aug.* 31, 1895.

Farmers' Loan & Trust Co.	$3,690 96	
M. F. Mott	6,000 00	
C. Dart, master commissioner	1,000 00	
Turner, McClure & Ralston	9,000 00	
		$22,690 96
W. L. Prather, special master		500 00
J. G. Winter, " "		3,850 00
J. G. Winter, " "		150 00
W. L. Prather, " "		500 00
" " "		750 00
Stenographer to " "		85 00
W. L. Prather, " "		1,000 00
Brooks & Wallace, printing court record		22 00
C. Dart, clerk, court costs		33 75
" " " "		2,698 48
Brooks & Wallace, printing court record		149 75
Clarke & Courts, " " "		732 75
E. H. Graham, all'ce as gen'l att'y		4,200 00
596 Alfred Abeel, " receiver		14,850 00
A. P. McCormick, " gen'l att'y		629 05
		$52,841 74

Correct:

S. L. WERDEN,
Act'g Auditor Waco & Northwestern R. R.

Dec. 3, 1895. Auditor's office.

Waco & Northwestern railroad—Alfred Abeel, receiver.

Betterments and Additions, Dec. 10, 1892, *to Sept'r 3rd,* 1895.

Bridges	$6,253 85
Shops and round-house	1,843 10
Car shed	1,287 80
Water station	50 79
Locomotives	18,140 50
Chair car	6,270 00
Fencing	12,659 36
Total	$46,505 40

Correct:

S. L. WERDEN,
Act'g Auditor.

Waco & Northwestern R. R. Dec. 3, 1895. Auditor's office.

Waco & Northwestern railroad—Alfred Abeel, receiver.

Earnings and Operating Expenses, Sept. 1st to 3rd, 1895, Inc.

Freight figured from billing	$1,162 49	
Passenger 1–10 of month of Sept.	474 36	
Mail 1–10 " " " "	48 63	
Express 1–10 " " " "	16 50	
Extra baggage 1–10 of month of Sept.	4 20	
Rentals 1–10 " " " "	31 50	
Total earnings		$1,737 68

597 *Operating Expenses.*

Maintenance of way & S. 1–10 of month of Sept.	$404 83	
Maintenance of equipment 1–10 of month of Sept.	65 66	
Conducting transportation 1–10 of month of Sept.	632 35	
General expense 1–10 of month of Sept.	108 83	
		1,211 67
Net earnings Sept. 1 to 3, '95, inc.		$526 01

Correct:

S. L. WERDEN,
Act'g Auditor Waco & Northwestern R. R.

Dec. 3, 1895. Auditor's office.

Waco & Northwestern railroad—Alfred Abeel, receiver.

Earnings and Operating Expenses for the Month of September, 1895.

Gross earnings.	Total this month.
Passenger	4,743.65
Mail	486.30
Express	165.00
Extra baggage	42.09
Freight	32,456.70
Rental	315.00
Total	38,208.74
Operating expenses	12,116.86
Net earnings	26,091.88

RECAPITULATION.

Operating Expenses.

Maintenance of way and structures	4,048.32
Maintenance of equipment	656.68
Conducting transportation	6,323.51
General expenses	1,088.35
Total	12,116.86

Correct: S. L. WERDEN,
Act'g Auditor.

598 Waco & N'thwestern R. R.

Statement of Freight Earnings from Sept. 1st to 3rd, Inclusive (1895).

From—	To—	
W. & N. W.	Foreign lines	494 85
"	Local	195 21
Foreign lines	W. & N. W.	403 28
	Intermediate	69 15
Total		1,162 49

Waco, Texas, Dec. 1, '95. S. L. WERDEN, *Act'g Aud'r.*

H.

Indorsements: Original Exhibit T, substituted by corrected statement marked "T I." Int. No. 78. Filed January 6, 1896. C. Dart, clerk, by Geo. H. Burnett, deputy.

"EXHIBIT T I."

Corrected Statement of Earnings, Expenses, &c., from Dec. 10, 1892, to Sept. 3, 1895.

Filed Jan'y 6, 1896.

Waco & Northwestern railroad—Alfred Abeel, receiver.

Statement of Earnings & Expenses, Dec. 10, 1892, to Sept. 3, 1895.

1895.		
Aug. 31. Gross earnings from operations as per sheet 1	$689,702 46	
Aug. 31. Expenses of operation as per sheet 2	368,354 19	
Income from operation to Aug. 31, 1895		321,348 27
Paid for court expenses as per sheet 3	52,541 74	
Paid for betterments as per sheet 4	46,505 40	
599 Total court expenses & betterments		99,047 14
Net income to Aug. 31, 1895		222,301 13
Received from Other Sources.		
From Charles Dillingham, former receiver	117,731 17	
From land account as per sheet 5	22,297 06	
Total from other sources		140,028 23
Total on hand to Aug. 31, 1895		362,329 36
Net earnings, Sept. 1 to 3rd, inc. (1895), as per sh. 6.		526 01
Total to Sep. 3rd, 1895		$362,855 37

Correct: C. A. RICHARDSON.

9—162

Waco & Northwestern railroad—Alfred Abeel, receiver.

Earnings from Operation, Dec. 10, 1892, *to Aug.* 31, 1895.

Freight	$137,053 56	
	29,109 06	
	3,891 65	
	230,796 77	
	89,980 04	
		$490,831 08
Passenger	47,239 39	
	4,559 13	
	2,058 38	
	61,902 61	
	31,585 80	
		147,345 31
600 Mail	4,290 33	
	5,298 69	
	2,917 82	
	972 61	
		13,479 45
Baggage	756 01	
	634 96	
	313 65	
	86 12	
		1,790 74
Express	1,865 00	
	2,090 00	
	1,320 00	
		5,275 00
Rentals	3,743 33	
	4,369 34	
	2,720 00	
		10,832 67
Miscellaneous	32 00	
	13,842 32	
	62 84	
	2,304 89	
Int. on deposit	3,244 66	
Right-of-way rents	661 50	
		20,148 21
		$689,702 46

Correct:

C. A. RICHARDSON.

Sheet 1.

Waco & Northwestern railroad—Alfred Abeel, receiver.

Operating Expenses, Dec. 10, 1892, *to Aug.* 31*st*, 1895.

Conducting transportation	$77,864 81		
	72,366 10		
	31,524 93		
	9,881 04		
	180 36		
			191,817 24
601 Maintenance of way and structures	35,265 50		
	35,235 11		
	13,986 43		
	5,344 88		
			89,831 92
General expense	28,046 44		
	24,959 96		
	16,443 63		
			69,450 03
Maintenance of equipment	3,817 33		
	110 88		
	29 83		
	4,824 56		
	4,108 96		
	1,370 68		
			14,262 24
Taxes	420 83		
	9,661 58		
	391 33		
			10,473 74
Total expenses			$375,835 17
Less court expenses charged herein by error as follows:			
Brooks & Wallace, printing court record	$149 75		
Clarke & Courts, printing court record	732 75		
C. Dart, clerk, court costs	2,698 48		
E. H. Graham, all'ce as gen. att'y	3,900 00		
			7,480 98
Total			$368,354 19

Correct:

C. A. RICHARDSON.

Sheet 2.

Waco & Northwestern railroad—Alfred Abeel, receiver.

Amounts Paid for Court Expenses, Dec. 10, 1892, to Sept. 3, 1895.

	Farmers' Loan & Trust Co.	3,690 96	
	M. F. Mott	9,000 00	
602	C. Dart, master commissioner	1,000 00	
	Turner, McClure & Ralston	9,000 00	
			22,690 96
	W. L. Prather, special master		500 00
	J. G. Winter, " "		3,850 00
	J. G. Winter, " "		150 00
	W. L. Prather, " "		500 00
	" " "		750 00
	Stenographer to " "		85 00
	W. L. Prather, " "		1,000 00
	Brooks & Wallace, printing court record		22 00
	C. Dart, clerk, court costs		33 75
	" " " "		2,698 48
	Brooks & Wallace, printing court record		149 75
	Clarke & Courts, " " "		732 75
	E. H. Graham, all'ce as gen'l att'y		3,900 00
	Alfred Abeel, all'ce as receiver		14,850 00
	A. P. McCormick, all'ce as gen'l att'y		629 05
	Total		$52,541 74

Correct:

C. A. RICHARDSON.

Sheet 3.

Waco & Northwestern railroad—Alfred Abeel, receiver.

Betterments and Additions, Dec. 10, 1892, to Sept'r 3rd, 1895.

Bridges	$6,253 85
Shops & round-house	1,843 10
Car shed	1,287 80
Water station	50 79
Locomotives	18,140 50
Chair car	6,270 00
Fencing	12,659 36
Total	$46,505 40

Correct:

C. A. RICHARDSON.

Sheet 4.

603 Waco & Northwestern railroad—Alfred Abeel, receiver.

Land Receipts and Disbursements, Dec. 10, 1892, *to Sept.* 3, 1895.

Received from Chas. Dillingham, former receiver	$6,383 57	
Received from land leases (rents)	13,935 74	
" " " notes	14,426 83	
" " int. on land notes	2,971 49	
" " int. on land deposits	667 37	
Land notes and int. since M'ch 5, 1895, the date of final decree	124 23	
Total receipts		$38,509 23
Expenses.		
Taxes paid	$14,839 97	
General land expense	1,372 20	
		16,212 17
Net land receipts		$22,297 06

Correct:

C. A. RICHARDSON.

Sheet 5.

Waco & Northwestern railroad—Alfred Abeel, receiver.

Earnings and Operating Expenses, Sept. 1 *to* 3*rd*, 1895, *Inc.*

Freight, figured from billing		$1,162 49	
Passenger,	1-10 of mo. of Sept.	474 36	
Mail,	"	48 63	
Express,	"	16 50	
Extra baggage,	"	4 20	
Rentals,	"	31 50	
			1,737 68

604

Expenses.

Maintenance of way & struct., 1-10 of mo. of Sept.	404 83	
" of equipment, 1-10 of mo. of Sept.	65 66	
Conducting transportation, 1-10 of mo. of Sept.	632 35	
General expense, 1-10 of mo. of Sept.	108 83	
		1,211 67
Net earnings for the 3 days		$526 01

Correct:

C. A. RICHARDSON.

Sheet 6.

Indorsements: "Exhibit T I." Waco & Northwestern railroad—Alfred Abeel, receiver. Int. No. 78. Corrected statement of earnings, expenses, &c., from Dec. 10, 1892, to Sept. 3, 1895. Downs. Filed January 6, 1896. C. Dart, clerk, by Geo. H. Burnett, deputy.

Copy of Report of Chas. Dillingham as Receiver W. & N. W. Div., Oct. 1, 1892, to Dec. 10, 1892.

Waco & Northwestern division ac. Chas. Dillingham, receiver H. & T. C. R'y Co.

Earnings.

1892.			
October.	Passenger	$5,412.13	
	Mail	357.18	
	Express	165.00	
	Freight	26,968.05	
	Rental	335.00	
			$33,237.36
Nov'b'r.	Passenger	4,647.74	
	Mail	357.18	
	Express	165.00	
	Freight	18,366.66	
	Rental	325.00	
			23,861.58
Dec'r 1 to 10, inclusive	Passenger	1,904.04	
	Mail	115.22	
	Express	55.00	
	Freight	4,934.85	
	Rental	108.33	
			7,117.44
			64,216.38

605

Expenses.

October:		
Maintenance of way & structures	2,982.03	
Maintenance of equipment	1,543.31	
Conducting transportation	7,305.23	
General expenses	912.52	
Stations, warehouses, and stock pens	26.13	
		12,769.22
November:		
Maintenance of way & structures	3,675.87	
Maintenance of equipment	1,354.51	
Conducting transportation	9,674.30	
General expenses	1,083.57	
		15,788.25

Dec. 1 to 10, inc.:

Maintenance of way & structures	1,402.61	
Maintenance of equipment	442.49	
Conducting transportation	14,186.37	
General expenses	9,775.81	
	25,807.28	
Less taxes previously charged to this division chargeable to taxes on Downs land and Olcott lands	13,790.16	
		12,017.12
		40,574.59
Balance to credit W. & N. W. division, Dec. 31, 1892		23,641.79

Memo.:

Balance to credit as per last statement	113,305.44	
Balance to credit as above	23,641.79	
	136,947.23	
Less cash paid on Dec. 14, 1892, to A. Abeel, receiver	100,000 00	
Balance to credit Jan. 1, 1893		36,947.23

606 Waco & Northwestern div.—ac. Chas. Dillingham, rec'r H. & T. C. R'y.

1893.

Jan. 31.	To taxes paid on Downs' lands and not included in previous statements, but chargeable to this division	$19,098.95	
Feb'y 11.	To tax paid on passenger revenue from October 1, 1892, to Dec. 10, 1892	117.21	
March 15.	To cash remitted A. Abeel, receiver	17,731.17	
			36,947.33

Cr.

By balance due W. & N. W. div., as per statement	36,947.23	
By cash to balance	.10	
		36,947.33

Indorsements: Int. No. 78. Copy report of Chas. Dillingham, as receiver W. & N. W. div., Oct. 1, 1892, to Dec. 10, 1892. Downs. Filed January 6, 1896. C. Dart, clerk, by Geo. H. Burnett, deputy.

Memorandum of Hearing—Stenographer's Report. Filed Jan'y 6, 1896.

THE FARMERS' LOAN AND TRUST COMPANY, Complainant,
vs.
THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY *et als.*, Defendants.
} No. 227. Eq.

In re Intervention of Geo. E. Downs, Master. C. No. 69.

Offerings on Behalf of Petitioner in Support of His Petition.

Offered accounts of Receiver Dillingham from April 1, '89, to December 11, 1892, marked "T I to T 4."

The accounts of Receiver Abeel from December 11th, 1892, until September 1st, 1895, marked "T 5 to T 8," being the same receiver's accounts in evidence on the claim of the Lackawanna Coal & Iron Co.

607 Offered in evidence also statement "T Prime" which is a statement prepared by the receiver from his records showing the gross revenues of the Waco & Northwestern Railway Co., the operating expenses, net earnings and other matters called for in the order of reference.

It is understood that the account of the receiver Dillingham for October, November and the first eleven days in December, 1892, will be produced and filed by Mr. Richardson at Waco before the master.

Counsel offered to be produced, if he could do so, a statement from the records of the receiver in 185 and 198 showing the revenues and expenditures of the Waco & Northwestern property between the date of the purchase by Downs, to wit: September 8th, 1888, and April 6th, 1889.

C. A. RICHARDSON, being sworn, testified:

Q. Mr. Richardson, what is your present position?

A. I am receiver's secretary of the Waco & Northwestern railroad.

Q. Have you charge of the records and books of the receivership?

A. They are in the auditor's office: I haven't entire charge, but I work on them.

Q. Are you familiar with them?

A. Yes, sir.

Q. Examine statement "T."

A. That is a statement from the books showing the earnings and operating expenses from Dec., 1892, to December, 1895.

Q. Where is that statement taken from?

A. The books of the receiver.

Q. Is that a correct statement according to the best of your information?

A. It is correct as far as it goes. There are one or two items of earnings that I think belong to earnings that we could not quite arrive at, that occurred during the first three months of the receiver-

ship, and on the short notice we have had to get up this statement we could not give it definitely. It would not affect the expenses or the betterments or the court expenses, and it will take probably five or six days, work to arrive at those items definitely. The first
608 two months of the operation the books were kept down at Houston, then when we moved to Waco the auditor started a new set of books entirely, beginning on the 1st of February, and on the short notice we had it was a matter of impossibility to get these things together and arrive at a definite understanding as to what they were really. There was a good deal of money sent (?) at one time, money that had accumulated while they were operating from December 10 to February 1st, and some of it, I do not know exactly what it was, and I have not had time to find out.

(Objected to as irrelevant.)

Q. I notice in that connection among the receipts specified land notes and leases. Will you explain to the court what that means?

A. That is money that has been collected from land notes given in part payment of purchase of land that was sold when Mr. Dillingham was receiver, and for interest on those notes and for rent of land that had been leased, and this amount that is shown here as received from land notes and lease, $15,739.39, is the amount received less the expenses. The taxes have been paid out and other expenses, and this is the net amount that was on hand at that time.

Q. That was all you carried into the account?

A. Yes. I did not put that in as running and operating expenses; it comes under the head of receipts from other sources, and that is the net receipts.

Q. Can you tell what proportion of that $15,000 is for rents collected?

A. No, sir; I could not tell that, but I have an idea as to how the total amount of collections stand. The total amount that has been collected during Mr. Abeel's receivership from land notes and leases is in the neighborhood of $32,000 and about $10,500 is for land rents; for lease money.

It was agreed by counsel that Mr. Richardson might prepare a statement explaining these entries and showing what portion of the land notes and leases were for rent and what portion for the price of land sold, and also state what amount was paid out of those receipts for taxes, said statement to be furnished to the master at Waco by Mr. Richardson.

Counsel admits that under the head of court expenses
609 mentioned in account marked Exhibit "T Prime" the amount paid to the Farmers' Loan & Trust Co. was paid under an order of court on account of expenses and commission; that the amount paid M. F. Mott was on account of his fees as solicitor for the complainant; that the amount paid C. Dart was for an allowance made to him for selling the Waco & Northwestern Railway property as special master commissioner in December, 1892, which sale was set aside; that the amount paid Turner, McClure & Ralston was on account of the fees allowed them by the court as solicitors in

this cause for the complainant, and that the other items of this expense account were as stated in the account under the head of betterments and additions.

Q. Just state to the master explanation of the character of each one of these additions.

A. The first item is bridges, and they were new bridges to replace two that were worn out, made by order of the court. Shops and round-houses were all new. Car shed was new. Water station was $50.79, and that was included in betterments account. That was not made by order of the court. I think it was the tank at Perry enlarged. Locomotives and two new engines. Chair car was new and fencing is all new.

Q. State whether those additions were all in existence at the date of the sale made last September and sold with the property.

A. Yes, sir; all these items were paid before that time; engine and cars and bridges were all in and shops built and fencing done to this amount at that time.

Q. These improvements were in existence when the sale was made last September, and were sold at that time with the property?

A. Yes, sir.

Mr. CAMPBELL: That the Waco & Northwestern branch was sold separately under the final decree rendered in case No. 198 and purchased on Sept. 8th, 1888, by Geo. E. Downs, intervenor here, he paying therefor $25,000, which was paid down at the time that the sale was duly reported to the court and was confirmed on December 4th, 1888, and deed thereafter made to him by the master commissioner on the 18th day of January, 1889, which we will fill in by data to be furnished by Mr. Grant; that the road on application of complainants in this cause was put in the hands of a separate receiver, Charles Dillingham, on the 6th day of April, 1889.

610–615

Approved.

WM. L. PRATHER,
Special Master.

Indorsements: Int. No. 78. No. 227. Equity. Master's No., 69. Geo. E. Downs, intervenor. Mem. of hearing. Stenographer's report. Downs. Filed January 6, 1896. C. Dart, clerk, by Geo. H. Burnett, deputy.

616 *Petition of Intervention of Lackawanna Iron and Coal Co. (Int. No. 4). Filed Nov. 3d, 1891.*

U. S. Circuit Court, Eastern District of Texas, at Galveston.

THE FARMERS' LOAN AND TRUST CO., Complainant, *vs.* THE HOUSTON & TEXAS CENTRAL RAILway Company *et al.*, Defendants. } No. 227. In Equity.

To the honorable the judges of the circuit court of the United States for the fifth judicial circuit and eastern district of Texas, at Galveston:

The petition of the Lackawanna Iron and Coal Company, a corporation organized under the laws of the State of Pennsylvania, and, as such, a citizen of said State, legally domiciled at Scranton therein, respectfully represents:

617 First. That on the 28th day of December, 1882, the 26th day of April, 1883, and October 30th, 1883, under and by virtue of three certain contracts bearing said dates, your petitioner which is engaged in the business of manufacturing Bessemer steel rails, did agree to furnish to the said Houston and Texas Central Railway Company, one of the defendants herein, upon the terms and conditions specifically set forth in said contracts, about twenty thousand tons of steel rails, at the prices severally mentioned; that it was agreed in said contracts that upon the delivery of each five hundred and sixty tons of said rails, or thereabouts, payments were to be made to your petitioner therefor, in cash, or in notes of said company, payable in six months from the average date of delivery to the maturity of the notes, with interest at the rate of six per cent. per annum, and with the privilege of renewing the said notes before their maturity, for a further term of six months, by giving new notes and paying the interest for the additional six months at the rate of six per cent. per annum.

Second. That copies of said contracts, as also of the statements hereinafter referred to in this petition as statements Nos. 1, 2, 3, 4 and 5, were filed by petitioner as annexes to a petition by it filed in suit No. 185 of the chancery docket of this court, styled The Southern Development Company *vs.* The Houston and Texas Central Railway Company *et als.*, and that your petitioner craves leave to refer to said contracts and statements, which are now of record in this honorable court in the records of said suit, as part of this petition, in like manner as if herein at length set forth, and that petitioner makes said contracts and statements a part of this petition.

Third. That under the first contract of December 28th, 1882, your petitioner delivered about 5,020 tons of rail, and received therefor, under said contract, ten promissory notes of the amounts and dates set forth in said document, marked statement No. 1, of record in said suit No. 185.

Fourth. That under the second contract, of date April 26th, 1883, your petitioner delivered about 5,009 tons of rail, and received therefor promissory notes of the amounts and dates set forth in said document so filed in said record No. 185, and marked statement No. 2.

618 Fifth. That under the third contract, for ten thousand tons, of date October 30th, 1883, your petitioner delivered about eight thousand five hundred and fifty-two tons and received therefor, as detailed in said document on file in said record No. 185, marked statement No. 3, seventeen promissory notes, all dated Houston, Texas, payable to the order of your petitioner, as follows, to wit:

One dated	Feb.	21st,	1884,	payable	12 mo. after date..	$20,595 97
"	"	23rd	"	"	..	31,439 72
"	"	25th	"	"	..	17,130 88
"	"	27th	"	"	..	9,233 27
"	March	12th	"	"	..	17,526 71
"	"	14th	"	"	..	32,281 25
"	"	19th	"	"	..	21,154 37
"	"	22d	"	"	..	13,791 17
"	April	2d	"	six	..	25,294 58
"	"	15th	"	"	..	15,478 14
"	"	17th	"	"	..	20,121 62
"	"	18th	"	"	..	17,888 47
"	"	22d	"	"	..	22,539 95
"	May	2d	"	"	..	3,788 81
"	"	5th	"	"	..	18,936 19
"	"	10th	"	"	..	19,480 11
"	"	15th	"	"	..	20,494 29

That all of said last-mentioned notes given under said third contract, due six months after date, were, at their respective maturities, as provided in said contract, extended for six months longer, and the interest upon them paid, so that in lieu of the above-mentioned notes, your petitioner received the following:

One note dated	Oct.	4,	1884,	payable	6 mo. after date..	$25,294 58
"	"	18	"	"	..	15,478 14
"	"	20	"	"	..	20,121 62
"	"	21	"	"	..	17,888 47
"	"	25	"	"	..	22,539 95
"	Nov.	5	"	"	..	3,788 81
"	"	8	"	"	..	18,966 19
"	"	13	"	"	..	19,480 11
"	"	18	"	"	..	20,494 29

Sixth. That the first five notes given to your petitioner under the first contract of December 28th, 1882, were paid at maturity, and that the other five notes therein mentioned were partially

619 paid at maturity and partially extended, and the extended notes were all finally paid in full.

Seventh. That of the ten notes given to your petitioner under the second contract of April 26th, 1883, some were partially paid at ma-

turity and extended, and the extended notes partially paid and extended further, until your petitioner was left in possession of the following notes as extensions of said original notes, to wit:

One note dated	Dec.	24,	1884,	payable at 4 months....	$10,000 00
"	"	22,	"	"	10,000 00
"	"	19,	"	"	10,000 00
"	"	31,	"	"	15,000 00
"	Oct.	30,	"	"	21,000 00
"	Sept.	25,	"	"	20,000 00
"	"	20,	"	"	20,000 00
"	Oct.	16,	"	"	12,000 00

That all of the extensions and renewals of said notes, all the payments of interest thereon, all the payments made of notes at maturity under all of said three contracts, are fully and correctly set forth in the sworn statement, marked statement No. 4, filed in the record of said cause No. 185 of the docket of this honorable court, and referred to as part hereof as hereinabove set forth.

Eighth. That said statements, Nos. 1, 2, and 3, show in detail the exact date of the delivery of each lot of rails under each of said contracts.

That all of the rails under the said first contract were delivered to said defendant in the interval between the 20th of February and the 4th of May, 1883; under the second contract in the interval between the 20th of June and the 21st of September, 1883; and under the third contract, in the interval between February 20th and May 16th, 1884.

That petitioner was proceeding to deliver the balance of said rails under said third contract when they were notified, on or about the 26th day of Decem*h*er, 1884, by the assistant treasurer of said defendant company, that said company would not need the balance of the rails under said contract.

Ninth. That, as appears by the above ssatement and exhibits, the said Houston and Texas Central Railway Company is in-
620 debted unto your petitioner for steel rail furnished as aforesaid in the sum of $445,175.50, with six per cent. per annum interest thereon, as follows:

On	$20,000 00	from	January	23d, 1885.
"	20,000 00	"	"	28th, "
"	12,000 00	"	February	19th, "
"	20,595 97	"	"	24th, "
"	31,439 72	"	"	26th, "
"	17,130 88	"	"	28th, "
"	9,233 27	"	March	2d, "
"	21,000 00	"	"	2d, "
"	15,000 00	"	"	3d, "
"	17,526 71	"	"	15th, "
"	32,281 25	"	"	17th, "
"	21,154 37	"	"	22d, "
"	13,791 17	"	"	25th, "

"	25,294 58	"	April	7th,	"
"	15,478 14	"	"	21st,	"
"	10,000 00	"	"	22d,	"
"	20,121 62	"	"	23d,	"
"	17,888 47	"	"	24th,	"
"	10,000 00	"	"	25th,	"
"	10,000 00	"	"	27th,	"
"	22,539 95	"	"	28th,	"
"	3,788 81	"	May	8th,	"
"	18,936 19	"	"	11th,	"
"	19,480 11	"	"	16th,	"
"	20,494 29	"	"	21st,	"

That said statement No. 5, hereinabove referred to as part of this petition, contains copies of all the aforesaid twenty-five promissory notes given to your petitioner as aforesaid, all of which are now past due.

Tenth. That all of said steel rails so delivered were used for the useful improvemens and necessary repair of the main line of said Houston and Texas Central Railway Co., and of the Western division thereof, and of the Waco and Northwestern division thereof, to the extent hereinafter more fully set forth. That said steel rails were so absolutely necessary to said company to enable it to replace the old iron with which its tracks were laid, that it is doubtful whether said company could have maintained its existence as a com-
621 mon carrier without them. That prior to the improvement and repair of said line of road with steel rails, as aforesaid, accidents to life and limb and damage to property was so great, owing to the condition of the tracks of said company, that the name of the Houston and Texas Central Railway Company became a terror to the traveling and shipping public, and a byword and a reproach. That by means of said steel rails so furnished by petitioner to said defendent railway, the railway of said defendant company has been kept in safe running order, its business and importance increased, and said railway thereby rendered more valuable to the bondholders under the various mortgages thereupon, and especially to the bondholders under the deed of trust and mortgage held by complainant herein, and upon which its bill of foreclosure has been filed in this cause. That said indebtedness was contracted by defendant in consideration of its promise to pay the same out of the earnings of its railway. That your petitioner made the contracss aforesaid and furnished the steel rail aforesaid under the expectation and belief that it would be paid for the same out of the revenues and earnings of said property; and that in case said revenues should not be sufficient, out of the proceeds of the sale thereof, by preference over any of the holders of mortgage bonds secured by deeds of trust on said property, but that said defendant, instead of paying the debt so justly due to your petitioner, out of the earnings of said railway, has entirely failed to pay the same, or any part thereof, as hereinabove set forth, and that the truth is, and your peti-oner so charges, that the said defendant has used a large

amount of said earnings for the payment of coupons upon bonds secured by the mortgage upon which a bill of foreclosure has herein been filed, although the holders of said coupons were only entitled to receive payment thereof after the defendant had paid your petitioner the amounts advanced and expended in the manner and for the purposes hereinabove set forth. That said steel rails so purchased by said railway company were actually used for the betterment and improvement of its railway aforesaid, and not for purposes of construction, and that the said rails have been an increment to the value of the property mortgaged to said bondholders, and that your petitioner has the right to claim and does claim that
622 the revenues of said railway property should be applied to the payment of petitioner's said indebtedness, by preference over the claim of any bondholders or coupon-holders, whomsoever.

Eleventh. Your petitioner further alleges that on the 16th day of Feb., 1885, or thereabouts, the Southern Development Company, a body corporate under the laws of the State of California, filed its bill in this honorable court against the said railway company, which said bill is known as No. 185 on the equity docket of this court, wherein the said Southern Development Company set forth the various mortgages and encumbrances upon the railway and other property of said Houston & Texas Central Railway Company, together with various other encumbrances issued by the said defendant railway company. That said Southern Development Company, by its said bill, alleged that said Houston and Texas Central Company was indebted to — in the sum of about six hundred thousand dollars, for money loaned at various times. That said Southern Development Company sought to enforce and effect payment of its said claims, and among other things in said bill, alleged and set forth the embarrassed condition of said railway company, the fact that its various creditors were pressing for payment, and its property was in danger of being scattered, wasted and lost to its creditors, and prayed that this honorable court should take possession of said property by appointment of receivers thereof, and might be pleased to decree that, out of the rents, revenues, issues and profits coming into the hands of said receiver, or receivers, after the payment of all costs of administration and operating expenses of said railway and necessary expenses for equipment and repair thereto, the claims of said Southern Development Company, together with interest and all cost, might be paid and satisfied.

Twelfth. That said Southern Development Company on its said bill moved this honorable court to appoint receivers of said property, and this honorable court did thereupon, on or about the 21st day of February, 1885, appoint Benjamin G. Clarke and Charles Dillingham as receivers of all the property of said railway company, in the manner and form as set forth in the order appointing said receivers in the record of said suit No. 185.

623 Thirteenth. That said Southern Development Company did thereafter, to wit: on or about the 18th day of April 1885, filed its amend*ment* and supplemental bill, whereby it made Nelson S. Easton and James Rintoul, trustees, and The Farmers'

Loan and Trust Company, trustee, defendants to said bill in their capacities as trustees of various mortgages, upon the property of the defendant company, and that the said Southern Development Company by said amended and supplemental bill further prayed:

1st. That an account might be taken, under the direction of your honors, of the several amounts due to said Southern Development Company by said Houston and Texas Central Railway Company, as also of all sums respectively due to all the other parties creditors of said company who might join said Southern Development Company in the prosecution of said suit, or who might intervene therein for the protection of their claims.

2d. That an account might be taken under the direction of this honorable court as to dates and amounts of money paid by said defendant company to any of the mortgages in the various deeds of trust, or to any holders of the bonds issued under various deeds of trust executed by defendant and secured by the mortgage upon its railways or any portions of the same, and the different times when paid, amounts paid for interest on the said bonds, and on which of the said bonds, as well as all the moneys paid into the sinking fund specified in said mortgages and deeds of trust, and what amounts arising out of the sale of any of the lands or town lots, or other real estate belonging to said railway company, had been paid to said bondholders, or deposited in trust, for their benefit, and that said account might be taken so as to show to this honorable court at what time or times, and what proportion of the said amounts, were paid out of the current revenues of said company, in the absence of any earnings, and what amounts and proportion were so paid out of the net earnings of said defendant railway company.

3d. That an account might be taken of all liens and encumbrances upon said property of said railway company, showing the amount and rank of each and the property affected by each, and also
624 an account of all the assets of every kind and nature belonging to the said railway company.

4th. That for the amounts found due on such accounting to the said Southern Development Company, and all intervening similarly situated persons, there might be a decree against the said railway company and against all of the defendants, declaring that the sums so due were liens upon the net earnings of said railway company, and upon all of its property, superior in rank to the claims of said trustee, and of the mortgage bonds and coupons issued under the said various deeds of trust; that the net earnings of said railway company in the hands of the receivers, appointed in said cause, should be first devoted to the payment of the amounts so decreed, and that if they should not be found sufficient within a reasonable time to pay said amounts, then that a sale of the property and assets of said railway company might be ordered and had in such manner and under such terms and conditions as might be to the best interests of all parties concerned, and that out of the proceeds of said sale, the amounts so due to said Southern Development Company might be first paid in preference to any amounts due on

said mortgage bonds and coupons issued under the various deeds of trust upon the property of said railway company.

5th. And further praying that should the sale of said defendant railway company's property be required to satisfy the decrees of this honorable court, then that said sale should be made in the manner and form as in said bill and supplemental bill set forth.

Fourteenth. That said Clarke and Dillingham, so appointed receivers of the property of said railway company, immediately upon said appointment qualified as receivers, took possession of all the property thereof, entered upon the discharge of their duties as such receivers and continued to act as such until the 10th day of July, 1886, or thereabouts, when they delivered possession of all the property of said railway company then in their possession as also of all revenues of the same which had come into their hands, to Nelson S. Easton and James Rintoul and Charles Dillingham, who had, prior to said 10th day of July, 1886, been appointed joint receivers of said railway company, under the bills of complaint filed by com-
625 plainants, and upon their application, in the manner and form and under the circumstances set forth in the record of the cause No. 198 of the docket of this honorable court and hereinafter more fully set forth.

Fifteenth. Petitioner further avers that said bill and said supplemental bill so filed by said Southern Development Company were by it filed in its own behalf, and in behalf of all other persons similarly situated who might intervene in said suit to protect their own interests, and that petitioner did, by permission of this honorable court, file its petition of intervention in said cause No. 185, on the 12th day of September, 1885, by which petition petitioner prayed that it might be allowed to intervene for its interest and join complainant and become itself a party complainant to said bill against all of the defendants; and whereby petitioner further prayed in all respects as was prayed by complainant, The Southern Development Company, in its bill and supplemental bill of complaint, and further prayed that an account might be taken of the sum due by defendant to petitioner on the contracts hereinabove set forth, and that your honors might decree that the sum found due, with interest, might be ordered to be paid out of the net revenues of the defendant company, and might be declared a lien thereon, and upon all the property of said company, superior in rank to the claims of the trustees, complainants in this bill, and to the mortgage bonds and coupons issued under their various deeds of trust. And whereby your petitioner further prayed for general relief and all such further orders and decrees as might be necessary and proper in the premises.

Sixteenth. That to said bill of said Southern Development Company so filed Nelson S. Easton and James Rintoul, trustees, filed their general and special demurrers, which were by this honorable court sustained, and the whole of said bill and supplemental bill of complaint dismissed with costs on the 27th day of May, 1886, but without prejudice to the rights of complainants to assert their claims, if any they had, in such manner as they might be advised;

and that said receivers, Clarke and Dillingham, were by said decree discharged and ordered to turn over all the property and effects of said railway company, together with all of its accrued revenues in their possession to Nelson S. Easton and James Rintoul and to Charles Dillingham, all of whom had been appointed joint receivers of said railway company in the manner and form as hereinafter set forth, and upon the application of the trustees under the various deeds of trust annexed to the bills of foreclosure in said cause No. 198.

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Seventeenth. That prior to the dismissal of said bill in said suit No. 185, said Easton and Rintoul and said Farmers' Loan and Trust Company, had filed three several bills of complaint in foreclosure in this honorable court, against various portions of the railway belonging to said defendant company, and which said bills are known as Nos. 198, 199 and 201 of the chancery docket of this honorable court, and were filed upon the dates following, to wit: the bills in said causes Nos. 198 and 199 on or about the 21st day of January, 1886, and the said bill in said cause No. 201, on or about the 18th day of April, 1886. That prior to the dismissal of said bill in said cause No. 185, this honorable court rendered an order consolidating said three causes, Nos. 198, 199 and 201, and ordering that the said three causes so consolidated should thereafter proceed and be known as "consolidated cause No. 198" of this honorable court, under the title of Nelson S. Easton and James Rintoul, trustees, and The Farmers' Loan and Trust Co., trustee, *vs.* The Houston and Texas Central Railway Company *et als.*, that the complainants in said consolidated cause, prior to the dismissal of said bill in said cause No. 185, had caused the appointment of receivers under their bills in said consolidated cause, to which receivers this honorable court as hereinabove set forth, ordered all the assets of said Houston & Texas Central Railway Company, then in the possession of said receivers, Clarke and Dillingham, to be turned over, as aforesaid, on the 10th day of July, 1886, and that all of the property of said railway company did thereafter remain in the possession of said joint receivers Easton, Rintoul and Dillingham, until the 7th day of December, 1888, or thereabouts, when said Easton and Rintoul were relieved from further duties as such receivers, and said Dillingham has continued as sole receiver in the premises, from said date until the present time.

627

Eighteenth. Petitioner further avers that it is provided by the various deeds of trust securing the mortgage bonds upon the various portions of the railway of the defendant railway company, that the trustees of such mortgages, if they acquire possession of said railway under said mortgages, shall pay any floating debt or debts of said company out of the gross earnings of the said railway, and that, under and by virtue of said provision, your petitioner's claims aforesaid are specially made preferred claims upon the gross earnings of said railway, and enjoy priority over all mortgages bearing upon the same, and are entitled to be paid out of the gross earnings of said railway, before said earnings are applied to the payment of any incumbrances whatsoever upon the same, and tha

your petitioner made the loans hereinabove described, relying upon the said clause in the said mortgages, and in the expectation that the said company would comply with the obligation therein recognized by itself and by its mortgage bondholders and that it would pay your petitioner's said claim before applying any part of its gross earnings to the payment of coupons or other bonded indebtedness. That said company and its bondholders are thus not only by law, but by contract, obligated to apply current earnings to payment of current expenses, and that such claims for current expenses are specially made preferred claims upon the gross earnings of said railway over all claims of bondholders.

Nineteenth. Petitioner further avers that said receivers so appointed in said cause No. 185, did, during their administration of the property of said defendant railway company, receive large revenues from the same, said revenues amounting, as petitioner is informed and believes, to a sum exceeding $3,500,000. That said receivers did also collect outstanding assets belonging to said company delivered to them when they took possession of said railway and of its property, and which outstanding assets realized an amount in cash of about $100,000. That large portions of said revenues and of said moneys so collected from outstanding assets of said Houston & Texas Central Railway Company were devoted to the permanent improvement and betterment of the property alleged to be
628 affected by the mortgages in favor of the trustees, complainants herein, thus giving increased value to the same, and that the property of said railway company, thus bettered and improved, was transferred from the receivers so appointed in said cause No. 185 to the receivers appointed in said cause No. 198. That said betterments and said improvements had in great part been made upon said railway by said receivers, prior to the filing of bills of foreclosure by any of the mortgage creditors of the defendant railway company; that is to say, prior to the filing of the bills in said causes Nos. 198, 199, and 201 of the docket of this honorable court, and that the receivers so appointed in said cause No. 185, did upon their discharge, transfer to the receivers in said cause No. 198, a very large sum in cash received by them during their administration. Petitioners aver that had this honorable court not taken possession of the property of said railway company, through its said receivers, said company would have been bound in equity and good conscience to pay out of its earnings the debt due to your petitioner as aforesaid. That this honorable court, in enforcing the rights of complainant herein, if any they have, ought to do what said railway company would itself have been bound in equity and good conscience to do, if it had remained in possession of its property; that is to say, to pay out of its earnings all debts chargeable upon its earnings. That petitioner's debt is one so chargeable, not only upon the funds and earnings of said railway company, which came into the hands of this honorable court at the date of the appointment of receivers in said causes Nos. 185 and 198, but also upon all such funds and earnings as have come into the hands of this honorable court during the pendency of said receiverships aforesaid, and that the using of the

earnings of said receiverships in betterments and extraordinary repairs and improvements to said railway has increased the security of the bondholders of said company at the expense of its supply creditors, and constituted such a use of the current debt fund for the benefit of said bondholders as to render it equitable and proper that the income of said receiverships, accrued and to accrue, should be henceforth used in the way in which said company would have been bound in equity and good conscience to use the same if no change in the possession of
629 said railway company had occurred; that is to say, to pay all debts chargeable upon its earnings, and that if the income of said receiverships now in the possession of this honorable court, or hereafter to accrue, be insufficient to pay the debts due to your petitioner and other persons similarly situated, then said debts should be paid by reimbursing a sufficient amount for said purpose to the current debt fund for the proceeds of any sales of the property of the defendant railway company, to be made herein under the decree of this honorable court, and that your honors should make provision in any decree herein to restore to the current debt fund, and distribute between your petitioner and other persons similarly situated such an amount as may, upon a full and fair accounting, appear to have been applied by said railway company prior to said receiverships or by this honorable court pending said receiverships, from the current debt fund to the payment of interest or fixed charges upon said railway, or to the making of betterments and extraordinary repairs upon the same.

Twentieth. Petitioner further avers that, at the date when the first of said foreclosure bills was filed, to wit, on the 28th day of January, 1886, said receivers, in said cause No. 185, had in their possession free from any encumbrance in favor of any bond or coupon holders of said railway company, a sum of $350,000, or thereabouts, in cash, and had, prior to said date, as petitioner is informed and believes and alleges, expended a sum of $70,000 for new locomotives, $225,000, or thereabouts, for new steel rails, and made other expensive repairs and betterments all in the manner and form as set forth in the report of said receivers, made to this honorable court on the 28th day of February, 1886, on file in this honorable court in the record of said suit No. 198, and which petitioner prays leave to refer to as part hereof.

Petitioner avers that in and to said sum of cash in the hands of said receivers, at the date of the filing of said foreclosure bill, said trustees, complainants herein, and the bondholders and couponholders of said railway company are without any right, title, interest or lien, either legal or equitable.

Twenty-first. Petitioner further avers that the receivers
630 in said cause No. 198 did receive from the receivers in said cause No. 185 a large sum in cash, which petitioner, upon information and belief, avers to have amounted to about $140,000, and that said receivers did also receive a large quantity of material from said receivers in said cause No. 185, and a large amount of assets of said Houston and Texas Central Railway Company, all as

per inventory on file in said cause No. 198, and that said receiver Dillingham is continuing to make extensive repairs and betterments upon said railway, and to administer the same in like manner as the same was administered by the receivers in said cause No. 185. That, while such repairs and betterments are and were undoubtedly necessary in order to put and keep the road in a condition in which it can be safely and advantageously operated, the expenditure occasioned thereby has resulted, and is resulting, in a large diminution of the amount of the current debt fund of the road, which diminution should be equitably compensated and made good by your honors in this case.

Twenty-second. That the receivers in said cause No. 185, and in this cause, have realized the sum of $150,000, or thereabouts, from the sale of old rails belonging to said defendant railway company, and the whole or a greater portion of which old rails were removed from the tracks of said railway company at points w-ere they have been replaced by said new steel rails sold by petitioner to said railway company, for which new steel rails the debt hereinabove set forth as due from said railway company to petitioner was incurred, and that said railway company was in equity and good conscience, bound to devote the proceeds of said old rails thus replaced by the new rails sold by petitioner to said railway company to the payment of the indebtedness due by said railroad company to your petitioner for said new rails, and that this honorable court should appropriate the proceeds of said old rails to the same purposes to which they should have been devoted by said railway company had this honorable court not taken possession of the assets of said railway company. Petitioner further refers to the records of said suits Nos. 185 and 198 as part of this petition in like manner as if the same were herein at length transcribed.

631 Twenty-third. That upon the petition of your petitioner so filed in said cause No. 198, a report was duly filed by the Honorable John G. Winter, special master in said cause, finding that under the facts of the case the debt for which petitioner filed its petition in said cause was of a character equitably entitling it to be discharged in preference to the debts embraced in the mortgages represented in said suit but which preference should be applicable to so much only of petitioner's debt as would remain unsatisfied after exhausting one hundred and seventy (170) certain bonds pledged as security, as recited in the report of the master in said cause, and recommending that a decree be entered accordingly; all of which, with other necessary particulars, will more fully appear from the report of said special master in said cause No. 198, to which report reference is made as part hereof, in like manner as if the same were herein at length transcribed; that complainant in this cause is and was a party to said cause No. 196, and did file exceptions to the report of said special master so filed upon the petition of your petitioner, but that said complainant herein has never brought said exceptions to a hearing, and that the same are still pending in this honorable court in said cause No. 198.

Twenty-fourth. That your petitioner is informed and believes, and

so avers that a large portion of the steel rails so furnished by petitioner to said defendant railway company were for the use and benefit of and were actually used upon and now constitute part of the railway described in the bill of complaint in this cause. That by orders heretofore rendered by your honors in this cause, the receivership so existing in said cause No. 198 has been extended to this cause, and that your petitioner in order more fully to protect its rights in the premises, and in order to obtain a decree by this honorable court as to the proportion of its claim chargeable upon the railways upon which a foreclosure is sought in this cause, desires to intervene therein for its interests.

Twenty-fifth. That your petitioner did during the year 1889, file suit upon its said claim in the district court of Dallas county, a court in the State of Texas of competent jurisdiction in the premises, and did in said suit obtain a judgment against said railway com-
632 pany for the full sum of five hundred and fifty-five thousand nine hundred and fourteen $\frac{25}{100}$ dollars ($555,914.25), with interest at the rate of eight per cent. per annum from the date of said judgment, the — day of May, 1889, until paid, and that said judgment, under the laws of the State of Texas, constitutes a statutory lien upon the earnings of said railway, whilst in the hands of said receivers, enjoying priority over the claims of any mortgage creditor.

Wherefore, in consideration of the premises, and your petitioner being without adequate relief, except upon the orders of your honors in this cause, prays that your honors will allow this petition to be filed, allow petitioner to intervene herein for its interests, and your petitioner further prays:

1st. That an account may be taken under the direction of your honors of the several amounts due to your petitioner by said Houston and Texas Central Railway Company, together with dates when same became due, and as the same have been liquidated and fixed by said judgment aforesaid.

2nd. That an account be also taken, under the direction of this honorable court, as to the dates and the amounts of money paid by the said defendant railway company to any of the mortgagees in the various trust deeds heretofore described, or described in the record of said cause No. 198, or to any holders of the bonds issued under said deeds of trust, and which bear or bore in whole or in part upon the railways described in the bill of complaint herein; that said account may also state the different times when said amounts were paid, the amounts paid for interest on said bonds, and on which said bonds, as well as all moneys paid into the sinking funds specified in said mortgage or deed of trust, and what amounts arising out of the sales of any of the lands, or town lots, or other real estate belonging to the said railway company, have been paid to the said bondholders or deposited in trust for their benefit; that the said account may be taken so as to show to this honorable court at what time or times, and what proportion of the said amounts were paid out of the current revenues of said company, in the absence

of any earnings, and what amounts and proportions were so
633 paid out of the net earnings of the said defendant railway company, and particularly so as to show what amounts and proportions were so paid out of the net earnings of those portions of the railways of the defendant railway company described in the bill of complaint in this cause.

3rd. That an account may be taken showing what proportion of the steel rails furnished by petitioner to said defendant railway was used upon the railways described in said bill of complaint aforesaid.

4th. That an account may be taken of all the liens and encumbrances on the said property of the said railway company, showing the amounts and rank of each, and the property affected by each, and also an account of all the assets of every kind and nature belonging to the said railway company.

5th. That an account may also be taken of all the receipts and expenditures made by said receivers in said cause No. 185, in such manner as to show the dates when said expenditures were made and the character of said expenditures, and particularly in such manner as to show which of such expenditures were made for operating and running expenses of said railway, and which of said expenses were made for extraordinary repairs, betterments and improvements of the property of said railway company, and for the payment of fixed charges upon the same.

6th. That for the amounts found due on such accounting to your petitioner and equitably chargeable upon the railways described in the bill of complaint in this cause there be a decree against the defendant railway company, and against all of the parties complainants and defendants herein, declaring that the sums so due are liens upon the net earnings of said railway company, and especially upon those portions of said net earnings which have accrued or may accrue from the railways described in the bill of complaint in this cause, both those accrued prior to said receivership in said cause No. 185, and those accrued and to accrue during the receivership in said cause No. 198, extended to this cause, and upon all of the property of said railway company, superior in rank to the claims of said trustee and of the mortgage bonds and coupons issued under the deed of trust sought to be foreclosed in this cause.

634 7th. That the net earnings of the railway described in the bill of complaint in this cause in the hands of said receiver, accrued or to accrue, be first devoted to the payment of the accounts so decreed, and if they be not sufficient prior to the final decree in this cause to pay said amounts, then that your honors do decree the payment of said amounts out of any proceeds of sale of the property of said railway company to be made under said final decree, the amounts so decreed to your petitioner to be paid in preference to any amount due under the mortgage bonds and coupons issued under the deed of trust annexed to the bill of complaint in this cause.

8th. And your petitioner further prays that this petition stand referred to the special master herein, to take the account hereinabove prayed for, and to investigate and report upon the subject-

matter of this petition with the opinion of the master as to the rank and claim of your petitioner.

And your petitioner prays for such further and general relief in the premises as the case may require, and as to your honors may seem meet and just.

FARRAR, JONAS & KRUTTSCHNITT,
Solicitors and of Counsel for the
Lackawanna Iron and Coal Co., Petitioner.

Order.

Let this intervention be filed.

DON A. PARDEE,
Circuit Judge.

October 31, 1891.

Indorsements: "No. 227. (Int. No. 4.) U. S. circuit court, eastern district of Texas, at Galveston. The Farmers' Loan and Trust Co., complainant, *vs.* The Houston & Texas Central Railway Co. *et als.*, defendants. Petition of Lackawanna Iron & Coal Co., and order allowing filing of same. Farrar, Jonas & Kruttschnitt, solicitors for petitioners, Denegre building, Nos. 33 and 35 Carondelet St., New Orleans. Filed Nov'r 3d, 1891. C. Dart, clerk, by W. L. Hanscom, deputy."

635 *Answer of Complainants to Intervention of the Lackawanna Iron and Coal Company (Int. No. 4).*

Circuit Court of the United States.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
GEORGE E. DOWNS. } No. —.

The complainant, The Farmers' Loan and Trust Company, makes these its exceptions, objections and defenses to the petition of intervention of the Lackawanna Iron and Coal Company herein.

I.

The petitioner has not in its said petition made or stated such a case as entitles it in a court of equity to any relief whatever as against the rights of this complainant by virtue of the mortgage sued on in this case, or any rights against that portion of the Houston and Texas Central railway known as the Waco & Northwestern division thereof, which is the subject-matter of this suit, or its property, or any earnings or revenue thereof, in the control of this court, or any remedy in this suit; and the complainant claims all right and benefit of the legal insufficiency of said petition and of all grounds of demurrer thereto, and to the several parts thereof in accordance with the rules of equity, and the practice of this court.

II.

As to the allegations of said petition, respecting the furnishing of rails to the Houston and Texas Central Railway Company, the making of a contract or contracts respecting the same, the delivery of such rails, the receipt of promissory note by the petitioner, the making of any such notes by said railway company, the extension of any such supposed notes, and the payment of any such notes, or of any moneys due on any of them, this complainant is not informed, save by said petitioner, and it leaves the petitioner to make such proof thereof as it be advised, and this complainant claims all benefit of general and special denial thereof, and the right to require strict proof of said intervenor of each and every matter thereof, and the right on its own behalf to produce evidence in controversion of the same.

636

III.

And this complainant further answering says, on information and belief, that all indebtedness of every sort and description, which ever existed on the part of said railway company to said petitioner has been fully paid, satisfied and discharged, and that said petitioner has received in full the amount of every claim, note, bond or obligation of any kind and description which it has, or ever has had, against any corporation or any person whatever by reason of any of the matters and things set forth in the petition herein, and this complainant denies each and every allegation therein contained to the contrary thereof.

IV.

As to any allegations in said petition contained respecting the contents of the deed of trust under foreclosure in this suit, under which the complainant is trustee, the complainant prays to refer to the said deed of trust, or to a certified copy thereof, for greater certainty in that behalf, but this complainant expressly denies that by anything in said deed contained the petitioner's pretended claim is specially or in any way made a preferred claim upon the earnings of the Waco & Northwestern division of said railway, and enjoys any priority over said deed of trust, and is entitled to be paid out of the earnings of said railway before said earnings are applied to the payment of coupon interest secured by the deed of trust under foreclosure in this suit, or any other incumbrance upon the same. This complainant is ignorant of the construction of said trust deed claimed to have formed the reliance or expectation under which petitioner made the sale alleged in its petition, and leaves petitioner to its proof on that subject; but it denies that said railway and its bondholders are or ever were in any way obligated to apply current earnings to payment of said claim or any claim or expense before the payment of interest on mortgage bonds, or that such claims are specially made preferred claims upon the gross earnings of said railway over the claims of bondholders, or that said intervenor had any just expectation thereof. And complainant insists that said

alleged expectations, based on default by said railway company and possession or seizure of the property, is wholly inconsistent with any *bona fide* claim as a current earnings creditor of said company.

637 V.

And the complainant avers that any improvement to the railroad property subject to the mortgage sought to be foreclosed in this suit, with funds received by the receivers of the Houston and Texas Central Railway Company, instead of the same being paid over to complainant, which may have been effected by the receivers, was effected at the wrongful expense of complainant, and to its detriment as trustee for holders of overdue and unpaid coupons on the bonds secured by the mortgage, to foreclose which this suit is brought and without this complainant's consent, and against its constant and active protest.

If such receivers had not been appointed the company would have been bound in equity and good conscience to pay interest on all its outstanding mortgage bonds in preference to paying any alleged debt to the petitioner, and such is now the duty of the receiver, as complainant is advised. The complainant denies that petitioner's debt is in — way chargeable on any earnings of the railway to the detriment of bondholders, and denies that any betterment, repair or improvement of the railway has increased the security of bondholders at the expense of supply creditors, and constituted such a use of the current debt fund for the benefit of the bondholders as to render it equitable and proper that the income of the receivership should be used to pay all debts chargeable upon earnings; and denies that if the income be insufficient to pay the petitioner and all persons similarly situated then said debts should be paid from the proceeds of sale.

VI.

The complainant admits that in February, 1885, suit was brought against the Houston and Texas Central Railway Company by the Southern Development Company and the road placed in the hands of two receivers, and that the bill in that cause was known as No. 185 on the equity docket, and was dismissed in May, 1886, and the road turned over to three joint receivers, but as to the allegations respecting the petition of the present petitioner in that cause, it refers to the said petition, or a certified copy thereof, for greater certainty.

638 VII.

The complainant further alleges that any sums of money that the receivers in said cause No. 185 held at any time in their possession, derived from the Waco and Northwestern division of said Houston and Texas Central railway, were so held for the benefit of the mortgage bondholders, secured by the mortgage foreclosed in this cause with a duty on the part of the receivers, under the direction and advice of the court, to pay out of such income the ordinary and

proper expenses in preserving and operating the said division of said railway committed to their charge, and to pay the balance to the use and benefit of said bondholders.

VIII.

The complainant further avers that in no respect whatever can the claims of the petitioner be considered current expense claims against the railway company or entitled to be paid out of its current income receipts, but the contrary is the case. Complainant is informed, and therefore avers, that at the date of the alleged contracts under which the petitioner claims, the railway was in fair average condition with the roads in Texas, none of which were up to the standard of first-class roads either as to construction or equipment. It was regularly and promptly paying its interest on its bonds, and the bondholders and their trustees had no right to investigate its management, nor were they consulted as to the same. But its stockholding managers conceived a scheme by which they thought to place it in a condition of superiority over other roads in Texas by laying it with steel rails, expecting thereby to be able greatly to increase its business and the value of the stock held by them. This complainant was not informed on the subject, and could have had no voice if informed.

IX.

And this complainant (without admitting the allegations of the petition respecting the agreement or contract between the petitioner and said railway company) says that whatever agreement was made between them contemplated the complete relaying and
639 reconstruction of the entire track and lines of said railway company, including over 516 miles of railway, for a large amount to be paid to said petitioner, and contemplated certain credits, and said petitioner is required to make full and exact proof of the facts relative to said credits and extensions. And complainant is also informed and alleges that a large amount of collateral security was required and taken from said railway company by said petitioner upon said contracts, and it requires full discovery thereof and alleges that said intervenor knew or had full means of knowing, and ordinary prudence required it to know that said railway company was then owing a large amount of other general and floating indebtedness, as shown in the bill of the said Southern Development — in 185, referred to in the intervention, and hereby referred to for its statement thereof. And complainant wholly denies that said intervenor contracted for said indebtedness on the faith or expectation of payment out of the current earnings of said railroad company, or ever was or became a creditor of that class, or entitled to the equities thereof as defined and required in the view of a court of equity in that behalf. That the equitable and substantial and practical owners of a large majority of the stock of said railway company had likewise control of other lines of transportation of great extent, and were parties of large capital and influence, and

that all the said sales by petitioner were upon the future and general credit of said railway company, and upon the reliance on the credit and management of said holders of said stock and the benefits of their patronage and influence, the said intervenor holding intimate and confidential relations with them.

X

The negotiation for said great amount of steel rails was not in the ordinary course of business and dealings, and not with or in reliance upon the corporate officials of said railway company, but originated with and was brought about and dictated by the said managing stockholders of said company. And if, as intervenor in substance and effect alleges, the same was made in anticipation of and looking to the practical insolvency of said railway company and its going into the hands of trustees or receivers before
640 payment for said steel rails, and with a view to supplant and cut out the rights of the mortgage bondholders by priority thus acquired over them, complainant charges that the same was a fraud and conspiracy wholly against equity and good conscience.

The relaying of the said railway with steel rails was not in the exercise of the usual and good faith, power and discretion of the directory of a railroad company for its necessary or customary repairs, but was extraordinary and extravagant, and wholly beyond the authority of the company, with reference to customary good faith repairs, to be paid in the customary manner out of the current earnings of the company.

XI.

The complainant further avers that upon the prayer of said petitioner, The Lackawanna Iron and Coal Company, the latter became and was a co-complainant with the said Southern Development Company in said cause 185, and was prosecuting the same identical claim sued on herein as such co-complainant, and that the said Southern Development Company, on the entry of the decree dismissing its said bill and all the proceedings and claims in said cause, give notice of and was allowed an appeal in said cause to the Supreme Court of the United States from the said decree of this honorable court, and entered into bonds with sureties in the amount fixed by the court to operate as supersedeas to said decree, which bond was duly approved and the said appeal was in all respects perfected, and the said cause No. 185 is now duly appealed to and pending and undetermined in the Supreme Court of the United States.

The intervenor herein is embraced in and a party in said appeal, and complainant submits to the court and pleads that the pendency of said appeal is a bar to the said intervention of the said Lackawanna Company herein, and that the same ought to be dismissed.

XII.

The complainant further avers that if any such indebtedness as is alleged by the petitioner was incurred by said railway
641 company, the same was incurred with full knowledge on the part of the petitioner of the existence of the mortgage,

made to complainant as trustee, to foreclose which this suit is brought, and of the fact that all the property and income of the said railway company included in and belonging to the so-called Waco and Northwestern division of said company was pledged for the payment of the bonds, secured by the mortgage, to foreclose which this suit is brought; and the complainant further alleges that the said division of the railway itself was built and constructed with the proceeds of the sale of the bonds secured by the said mortgage, and that the complainant, as trustee, has in equity and a good conscience a first and paramount claim upon the said division of said railway and property and the earning thereof.

XIII.

The complainant further alleges that about the year 1877 the majority of the stock of the said railway company became the property of one Charles Morgan, who controlled the management of the railway company by means of his ownership of the said stock, and who in the following year caused to be incorporated, by the State of Louisiana, a corporation entitled "Morgan's Louisiana & Texas Railroad and Steamship Company," to which company so incorporated the said Morgan transferred, and thereby vested in it, the ownership of a large majority of the shares of the said railway company. As he was the sole substantial owner of the stock of Morgan's Louisiana & Texas Railroad and Steamship Company, he was able to control and did control the management of the said railway company by means of his ownership of the Morgan Company's stock. Subsequently the ownership of the Morgan Company's stock passed into the hands of certain capitalists, who were the chief owners of certain railway lines running from San Francisco, California, to the Mississippi river, commonly known as the "Southern Pacific system." This ownership of these parties was represented, when said suit No. 185 was brought by The Southern Development Company, complainant therein, a corporation organized under the laws of California for the purpose, among other things, of representing such ownership and control. This complainant has
642 heard rumors to the effect that the stock of said development company has been transferred to some other corporations or corporation, but as to the facts this complainant is not informed; but it expressly avers that however said stock may now be held, the corporation or corporations owning the same are owned and controlled by the same capitalists above mentioned, or their representatives, and in the same interests. Wherefore complainant alleges that the said development company, or whatever corporation may actually hold such stock as aforesaid, is actually the owner (through the Morgan Company) of the majority of the stock of the Houston & Texas Central Railway Company, and that the policy of the latter company and its management is controlled and dictated by the Southern Development Company, and by those who are the owners of its stock. Complainant further alleges that the Houston & Texas Central Railway Company, being controlled as aforesaid,

the parties having such control took measures to have the said railway company thrown into the hands of receivers, as aforesaid, with the object, among other things, of forcing and compelling the owners of bonds, including those for whom this complainant is trustee, to reduce their interest and to settle their claims against the railway company at less than their face. Part of this plan was to set up a large indebtedness on the part of the railway company to the Southern Development Company and the Morgan Company (said companies in fact representing the stockholders of the railway company) and also to other companies, with which the relations, as aforesaid, of their owners were confidential, and to prevent all payment of bonded interest, and to divert all of the earnings of the railway company into a continued, substantial reconstruction thereof, and to claim that the amount of all expenditures therefor were at the expense of the bondholders, and to be deducted from their security and applied to the payment of said floating debts of the company.

The said parties in interest being those who actually owned the majority of the stock of the railway company and controlled its proceedings and policy, proceeded to file in the name of the Southern Development Company said suit No. 185 and obtained
643 the appointment of receivers therein, asking from the court the appointment as receiver of one of the directors and officers of the Lackawanna Iron and Coal Company, intervenor herein, viz: Benjamin G. Clarke, it being desired that he should receive said appointment in the interest of the floating indebtedness and in general furtherance of the scheme above referred to. But this honorable court, on such application being made, refused to appoint said Clarke, except in conjunction with some other person, and thereupon Messrs. Clarke and Dillingham were appointed joint receivers.

The said receivers retained as their counsel and solicitors throughout their receivership the same solicitors who filed and prosecuted the bill No. 185, and the same solicitors proceeded in suit No. 185 to institute the interventions and suits upon the claims of the intervenor herein, and of the Morgan Company, and of the Missouri Pacific Railroad Company, and to claim like priorities for each. And complainant insists that all said parties were alike privy and consenting to, and procuring and responsible for, all the expenditures under said receivership, and that they ought not to be permitted to set up the same as any ground of equity in their behalf against complainant, who has continuously asserted the liability and the said application of the earnings of the said road beyond necessary operating expenses to their said bonded mortgage debt.

XIV.

And the complainant further avers that since the filing of said bills 183 and 184, this complainant and the complainants in said bills have continuously sought to subject the earnings of said railway company to the payment of overdue interest on the mortgage debt, as well as to make good the sinking fund, for which it was bound; and denies all allegations in the interven-

tion seeking to hold it responsible for any other or different application of said earnings or funds, and denies that there are any facts in the course of said receivership in any suit by which, in equity and good conscience, any claim to priority of earnings, or on account of the application thereof, or to the proceeds of old rails sold, or from any other cause, can be set up by the
644 intervenor as against complainant. The express object and design of said suit 185, as shown therein, was to prevent the trustees from the exercise of their legal rights under the mortgages, from obtaining the possession of the said railroad, and making the application of its earnings and receipts in accordance with the mortgages.

XV.

As to the allegations of the petitioner respecting a petition filed by it in said case No. 198, and a report of the special master thereon in said cause, this complainant prays to refer to the originals thereof on file in this court, for greater certainty in that regard, expressly alleging, however, that this complainant duly filed its exceptions to the said report, to which it also refers as part of this answer, which said exceptions have never been brought on for hearing, and said report has never been confirmed, nor any decision, order or decree rendered by this court on the same.

XVI.

As to whether the petitioner ever filed suit on its said alleged claim, as averred in said petition, and obtained judgment thereon, this complainant is not informed; but it expressly alleges that it was not a party to any such action, and further alleges, being so informed, that said judgment, if obtained, has been paid and satisfied. And it expressly denies being so advised, that any such judgment, if obtained, under the laws of Texas constitutes or ever constituted a statutory lien upon the earnings of the railway whilst in the hands of receivers enjoying priority over the claims of any mortgage creditor.

Wherefore the complainant prays that said petition of the said Lackawanna Iron and Coal Company be dismissed with costs.

THE FARMERS' LOAN & TRUST COMPANY,
By R. G. ROLSTON, *President.*

Attest: E. S. MARSTON, *Sec'y.*

TURNER, McCLURE & ROLSTON,
[SEAL.] M. F. MOTT,
Solicitors for Complainant.

645 STATE OF NEW YORK, }
Southern District of New York, } ss:

I, Rosewell G. Rolston, being duly sworn, depose and say, that I am president of The Farmers' Loan and Trust Company, the complainant above named, and have been such president for a number

of years past; that I have read the foregoing answer and know the contents thereof, and that the same is true to my own knowledge, except as to those matters therein stated on information and belief, and as to those matters I believe it to be true. That this verification is not made by the complainant because it is a corporation; and that my knowledge is derived from having taken part in the transactions spoken of and from statements made to me and from examination of the papers, and the same constitute my grounds of belief. The seal affixed to said answer is the corporate seal of said complainant, and was so affixed by its authority.

R. G. ROLSTON.

Sworn to before me this 14th day of Nov., 1891.
[SEAL.] GEORGE C. AUSTIN,
Notary Public, N. Y. Co.

Indorsements: No. 227. Equity. Circuit court of the United States. Int. No. 4. The Farmers' Loan and Trust Company *vs.* George E. Downs. Answer of complainant to the petition of intervention of the Lackawanna Iron and Coal Company. Turner, McClure & Rolston, attorneys for pl'ff, 22 William street, New York. Filed Dec'r 7th, 1891. C. Dart, clerk.

Petition and Order Allowing Pacific Improving Co. to Join Lackawanna Iron & Coal Co. in Prosecuting Claim.

U. S. Circuit Court, Eastern District of Texas, at Galveston.

THE FARMERS' LOAN AND TRUST CO.
vs.
THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY *et als.* } No. 227.

646 To the honorable the judges of said court:

Your petitioners, The Lackawanna Iron & Coal Company, the original petitioner herein, and The Pacific Improvement Company, a corporation organized under the laws of the State of California, with due respect show:

That during the pendency of the proceedings had by the Lackawanna Iron & Coal Company in the consolidated cause No. 198, styled Nelson S. Easton and James Rintoul, trustees, and The Farmers' Loan and Trust Company, trustee, *vs.* The Houston and Texas Central Railway Company *et als.*, which are referred to and set forth in the original petition herein, all the rights and claims of said Lackawanna Iron & Coal Company therein set forth were assigned to the other of your petitioners, The Pacific Improvement Company, and since said transfer the said claim has been prosecuted in the name of the—for the account and benefit of the Pacific Improvement Company; and that your petitioner, The Pacific Improvement Company, desires to join in the prosecution of said claim for its own account and benefit.

Wherefore your petitioners pray that this petition may be filed and that an order may be entered herein permitting the Pacific Improvement Company to become a coplaintiff with the Lackawanna Iron & Coal Company in the petition herein filed by said company on Nov. 3d, 1891, and to join the said Lackawanna Iron & Coal Company in the prosecuting of the claim therein set forth for account and benefit of the Pacific Improvement Company; and that notice of this order may be given to the Farmers' Loan & Trust Company and the Houston and Texas Central Railway Company and to George E. Downs.

FARRAR, JONAS & KRUTTSCHNITT,
Counsel & Solicitors.

Order.

Let this petition be filed, and let the Pacific Improvement Company be made coplaintiff with the Lackawanna Coal & Iron Company, in the petition herein filed on Nov. 3rd, 1891, to aid and assist in the prosecuting of said claim, and let the Farmers' Loan and Trust Company, George E. Downs and the Houston and Texas
647 Central Railway Company be notified of this order by service of the same on their solicitors of record.

DON A. PARDEE,
Circuit Judge.

Feb'y 5th, 1892.

Notice of this petition and order accepted for Geo. E. Downs.
WM. GRANT, *Solicitor.*

Feb'y 5, 1892.

Indorsements: No. 227. Int. No. 4. Chancery docket. U. S. circuit court, 5th circuit & eastern district of Texas, at Galveston. Farmers' Loan & Trust Co. *vs.* The Houston & Texas Central R'y Co. *et als.* Supplemental petition of Lackawanna Iron & Coal Co. & Pacific Imp. Co. Filed Feb'y 6th, 1892. C. Dart, clerk, by W. L. Hanscom, deputy. Farrar, Jonas & Kruttschnitt, attorneys for petitioners, Denegre building, Nos. 33 & 35 Carondelet St., New Orleans.

Exceptions, &c., of Moran Bros. and Henry K. McHarg to Int. of Lackawanna Iron and Coal Company.

In U. S. Circuit Court for the Eastern District of Texas, at Galveston.

FARMERS' LOAN & TRUST COMPANY, Trustee, Complainant, *vs.* THE HOUSTON & TEXAS CENTRAL RAILWAY Company *et al.*, Defendants.	No. 227. Equity.

The intervenors, Moran Bros. and Henry K. McHarg, make this their exceptions, objections, and defenses to the petition of intervention of the Lackawanna Coal and Iron Company herein:

1. These intervenors adopt the demurrers, pleading and answer of the Farmers' Loan & Trust Company filed herein on December 7, 1891, to the said petition of intervention, and prays that the same be taken and considered as the demurrers, pleading and answer of these intervenors.

2. And in addition thereto these intervenors show that the
648 pretended claim of said intervention accrued more than two years prior to the filing of their said petition of intervention herein, and accrued more than four years prior to the filing of their said petition of intervention herein and as to these intervenors is barred by the statute of limitation of two and four years, which is here specially pleaded.

L. W. CAMPBELL,
Attorney for Intervenors, Moran Bros. and Henry K. McHarg.

Indorsements: "No. 227. Intervention No. 4. Master's No., 68. Lackawanna I. & C. Co. *et al.*, intervenors. Farmers' Loan and Trust Co., trustee, *vs.* H. & T. C. R'y Co. *et al.* Exceptions, &c., of Moran Bros. and Henry K. McHarg. Filed Nov. 16, 1895. Wm. L. Prather, S. M. Filed January 13, 1896. C. Dart, clerk, by Geo. H. Burnett, deputy."

Report of Wm. L. Prather, Special Master, upon the Intervention of the Lackawan-a Iron & Coal Co.

Master's No., 68.

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

FARMERS' LOAN & TRUST CO., Trustee, Complainant, *vs.* H. & T. C. R'Y CO. ET AL., Defendants. } No. 227. In Chancery.

Lackawanna Iron & Coal Co., Intervenor.

To the hon. judges of said court:

By authority of an order of the Hon. Don A. Pardee, circuit judge, made October 31st, 1891, the Lackawanna Iron & Coal Co. filed with the clerk of this court at Galveston on November 3rd, 1891, its petition of intervention herein, which petition, by an order of reference entered October 22nd, 1895, at Galveston, by the Hon. A. P. McCormick, circuit judge, and the Hon. D. E. Bryant, district judge, and filed before the special master on November 16th, 1895, was referred to said master "to take the accounts in said petition prayed for, and to investigate and to find and report upon
649 the facts as to the subject-matter of said petition and of the answers thereto;" leave being granted at the same time to the complainant "to amend its pleadings herein before said master in like form and manner as it might on the date of and prior to the above order of reference; and to intervenors, Moran Brothers and

H. K. McHarg, to file such pleadings before said master as they may be advised and in like manner as they might on the date of and prior to the above order of reference; such amendments and pleadings to be filed, however, within thirty days from the date of this order." The master was further ordered to file his report herein on or before the first Monday in January, 1896, said time being extended by order dated January 4th, 1896, to the second Monday in January, 1896.

On November 16th, 1895, the intervenors, Moran Brothers and Henry K. McHarg, filed before me, their answer adopting the "demurrers, pleading and answer of the Farmers' Loan & Trust Company filed herein on December 7th, 1891," to the petition of intervention of the Lackawanna Iron and Coal Company, and pleading also the statutes of limitation of two and four years as a bar to said intervenors' cause of action.

After notice duly extended to all parties in interest, said reference came on to be heard at the U. S. court-room at Galveston, Texas, on December 4th, 1895, when and where appeared E. B. Kruttschnitt, Esqr., solicitor for intervenor, M. F. Mott, Esqr., solicitor for complainant, and L. W. Campbell, Esqr., solicitor for Moran Brothers and Henry K. McHarg.

By consent of all parties, complainant and intervenors, Moran Brothers & Henry K. McHarg amended their answer to the petition of intervention by adding to paragraph 15, of their said answer the following allegation: "But complainant was not party to said cause, or to any cause prior to the filing of the bill herein in its capacity as trustee for the bondholders secured by the mortgage declared on herein."

The issues between the parties being thus made, evidence was heard in part at Galveston, and by agreement of all parties, the hearing was adjourned to Houston, Texas, where on December 5th, 1895, the evidence was further heard, and said hearing further adjourned to Waco, Texas, where on December 23rd, 1895, it was further heard, and said hearing continued from time to time to January 9th, 1896, when the same was concluded.

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I file herewith the pleadings of the parties, a list of the evidence introduced, and a memorandum of the hearings at Galveston and Houston.

Upon consideration of the pleadings, the evidence submitted, agreement of counsel and the admissions made by them during the progress of said hearing, I find as follows:

I.

I find that on the 28th day of December, 1882, the Lackawanna Iron & Coal Company entered into a written agreement with the Houston & Texas Central Railway Company, as set forth in a written contract of said date, for the delivery by said Lackawanna Company to said railway company of five thousand tons of Bessemer steel rails, such delivery to be made as nearly as practicable during the months of March, April and May, 1883, and that upon the de-

livery of each five hundred tons, payment should be made therefor in cash, or in the notes of the purchaser, payable at six months from the average date of delivery, with interest from such date at the rate of six per cent. per annum; that 5,020 tons of steel rails were delivered by said Lackawanna Company to said Houston & Texas Central Railway Company, under this contract, at the price of $40.40 per ton, during the months of February, March, April and May, 1883, in payment for which the railway company executed to the said Lackawanna Company during the said months of March, April and May, ten promissory notes, payable at six months from their respective dates, amounting, with interest, to $206,932.16, all of which debt was paid by the railway company, either at maturity of said notes or at maturity of other notes given in renewal thereof. A copy of said written agreement is on file as an annex to the petition of intervention of the Lackawanna Iron & Coal Company, in consolidated cause No. 198 of the equity docket of your honorable court, being marked "document A," and a copy thereof is herewith filed and referred to.

651 II.

I find that on the 26th day of April, 1883, the said Lackawanna Company and the defendant railway company entered into another contract in writing, similar in general terms to the contract hereinbefore mentioned—whereby said Lackawanna Company contracted to deliver to said defendant railway company five thousand tons of Bessemer steel rails at $39.50 per ton, during the month of August, 1883, or earlier, as called for, and that under this contract said Lackawanna Company delivered to said defendant railway company in the months of June, August and September, 1883, 5,009 tons of steel rails, and received in payment therefor ten promissory notes executed by the defendant railway company, dated in 1883, on the days and months following, to wit, June 21st, 22nd, 23rd; August 10th, 14th, 15th; September 6th, 11th, 15th, and 20th; each payable six months after date, and aggregating, with interest, $201,346.64, it being provided in said contract that the said defendant railway company should have the privilege of renewing such notes before maturity for a further term of six months by paying the interest, six per cent., or adding the interest to the new notes.

I find that said contract was in the words and figures set forth in "document B," annexed to the petition of said Lackawanna Company, filed in said record No. 198, and of which a copy is herewith filed and referred to.

I find that as these notes matured, the payment of so much of the debt as was not satisfied at maturity was extended until in process of such settlements and extensions, the defendant company, in settlement of balance due to said Lackawanna Company under said contract of April 26th, and in satisfaction of all outstanding notes given under that contract, executed and delivered to petitioner eight promissory notes, payable four months from their respective dates,

with six per cent. interest from maturity; said notes being for the amounts, and dates, and identified as follows, to wit:

No. 924	dated	Dec.	24, 1884,	4 mos.,	$10,000.00
" 923	"	"	22, 1884,	"	10,000.00
" 922	"	"	19, 1884,	"	10,000.00
" 927	"	Oct.	31, 1884,	"	15,000.00

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No. 916	"	"	30, 1884,	"	21,000.00
" 909	"	Sept.	25, 1884,	"	20,000.00
" 908	"	"	20, 1884,	"	20,000.00
" 911	"	Oct.	16, 1884,	"	12,000.00
Total					$118,000.00

I find that in the negotiations between the creditor and debtor which resulted in the execution of the renewal notes above described, the creditor—petitioner—demanded that the debtor—the defendant company—should secure such renewal notes by the hypothecation of collaterals; and in response to this demand the defendant company did hypothecate with petitioner, when the renewal notes were delivered, one hundred and seventy bonds, being first-mortgage bonds of the Galveston, Harrisburg and San Antonio Railway Company, of the face value of one hundred and seventy thousand dollars; that is to say, thirty of said bonds were hypothecated to secure the payment of the note for $20,000.00 dated September 20th; thirty for the note for $20,000.00 of date September 25th; fifteen for the note of $12,000.00 of date October 16th; thirty for the note for $21,000.00 of date October 30th; twenty-five for the note for $15,000.00 of date October 31st, and forty for the three notes of $10,000.00 each, of dates December 19th, 22nd and 24th, which several renewal notes are yet unpaid.

I find that the value of said 170 bonds, so loaned, is at present ninety-two and one-half per cent. of the face value thereof, making a total of $157,250.00. It appears that said bonds are in the possession of the Pacific Improvement Company, assignee of said iron company as collateral as aforesaid, and that no interest on said bonds has been collected by said iron company or by the defendant railway company, buf that the same has been collected by said Southern Development Company.

It was agreed by counsel that without making an actual sale of said 170 bonds, the court should consider the same as sold for said amount of $157,250.00 on December 23rd, 1895, and should apply such sum as a credit as of said date, upon the claim of the Lackawanna Iron and Coal Company, or of the Southern Development Company as the court may determine.

653

III.

I find that on the 30th of October, 1883, the said Lackawanna Company and the said defendant railway company entered into another contract, in writing, being the contract on file as an annex

to the petition of said Lackawanna Company in record No. 198 of the docket of this honorable court, and marked "document C," of which a copy is annexed to and made a part of this finding.

I find that said contract is similar in general terms to those of December, 1882, and April, 1883, and that by it said Lackawanna Company contracted to deliver to the defendant railway company ten thousand tons of Bessemer steel rails at $36.60 per ton, such delivery to be made as nearly as practicable from February 1st to August 1st, 1884, at the rate of fifteen hundred to two thousand tons per month; that this contract provided that upon the delivery of each five hundred tons of rails, payment should be made therefor, either in cash or in the notes of the defendant railway company, payable at six months from the average date of such delivery, with six per cent. interest added from such date, with the privilege in the purchaser to renew such notes before their maturity for a further term of six months, by paying the interest, or adding the same to such renewals.

I find that under this contract said Lackawanna Company, during the months of February, March, April and May, 1884, delivered to the defendant railway company 8,552 tons of steel rails.

I find that in said March and April, the auditor of the defendant railway company made a statement or "voucher" of rails then delivered under this contract, which statement passed into the hands of the treasurer of the defendant railway company, with a memorandum that notes were to be issued therefor payable at twelve months, and that in pursuance of this memorandum eight notes, payable twelve months from their respective dates, instead of six months, as provided in said contract, were executed by the defendant railway company and sent to said Lackawanna Company, whereupon said Lackawanna Company wrote said defendant railway company, calling attention to the error, but the notes already sent were received as a matter of accommodation to said de-
654 fendant railway company. That afterwards, in April and May, 1884, the defendant railway company, in settlement of the balance due upon said 8,552 tons of rails, executed and delivered to said Lackawanna Company nine promissory notes, payable, under the contract, at six months from their respective dates, with the option in the maker of renewal for a like term.

I find that each of these notes were renewed for six months for like amounts as the originals.

I find that said notes were for the amounts and dated as follows, to wit:

No. 826,	dated	February	21,	1884,	12	mos	.....	$20,595 97
" 827,	"	"	23,	"	"	"	.....	31,439 72
" 828,	"	"	25,	"	"	"	.....	17,130 88
" 829,	"	"	27,	"	"	"	.....	9,233 27
" 830,	"	March	12,	"	"	"	.....	17,526 71
" 831,	"	"	14,	"	"	"	.....	32,281 25
" 832,	"	Mar.	19,	1884,	12	mos	.....	21,154 37
" 833,	"	"	22,	"	"	"	.....	13,791 17

" 910,	"	Oct.	4,	"	6	"	.....	25,294 58
" 912,	"	"	18,	"	"	"	.....	15,478 14
" 913,	"	"	20,	"	"	"	.....	20,121 62
" 914,	"	"	21,	"	"	"	.....	17,888 47
" 915,	"	"	25,	"	"	"	.....	22,539 95
" 918,	"	Nov.	5,	"	"	"	....	3,788 81
" 919,	"	"	8,	"	"	"	.....	18,936 19
" 920,	"	"	13,	"	"	"	. .....	19,480 11
No. 921, dated		Nov.	18,	1884,	6	mos	.....	20,494 29
Total			.....		...		.....	$327,175 50

IV.

I find that the defendant railway company is indebted to said Lackawanna Company in the amounts of the several notes set forth in the foregoing two statements, the aggregate of the one being $118,000, and of the other $327,175.50; total, $445,175.50, together with interest on the amount of each of said notes at the rate of six per cent. per annum from their respective dates of maturity.

I find that negotiable promissory notes were given peti-
655 tioner by the defendant company for all rails sold under the three contracts; that all of said sales were made on a stated credit for a fixed period of time, viz: six months after the average date of each delivery, and that said defendant company had the right, under said contracts, to extend the time six months longer from the maturity of said notes; that such extensions were made for the accommodation and to suit the convenience of said defendant company and that said extended negotiable notes remaining unpaid matured as shown above in clauses 2 and 3, during the months of February, March, April and May, 1885.

I find that all the rails delivered under the first contract, and about one-half of the rails delivered under the second contract, were paid for by the railway company prior to the appointment of any receiver of said property, but that the remaining half under the second contract, and all rails furnished under the third contract, are not paid for.

I find that the rails furnished under the second contract were furnished under a contract made a year and ten months prior to the appointment of the receiver in cause No. 185, and about three years and three months prior to the appointment of the receiver in consolidated cause No. 198, and about six years prior to the appointment of the receiver in this cause.

I find that the rails furnished under the third contract were furnished under a contract made about sixteen months prior to the receivership in cause No. 185, and about two years and nine months prior to the receivership in consolidated cause No. 198, and about five years and six months prior to the appointment of the receiver in this cause.

V.

I find that 6.2 miles of the railway of the Waco & Northwestern division of the Houston & Texas Central railway was laid with rails furnished under the first two above-named contracts, but no evidence was submitted to me showing what proportion of said rails was furnished under each of said contracts respectively.

I further find that of 56-pound rails, it requires 88 tons to lay one mile of track.

I find that of the said railway 30.8 miles were laid with rails furnished under the third of the above contracts.

656 I find that it requires 84.86 tons of 54-pound rails to construct one mile of railroad.

I find that the old iron rails removed from the 37 miles of the said Waco & Northwestern division, upon which said steel rails were laid, were received by the receivers in said cause No. 185, and by them sold at the price of $13.00 per ton, net; that there were 2,960 tons of such old iron rails so removed from said division and so sold; that said rails were sold in the year 1885.

VI.

I find that the debt for which the Lackawan-a Company claims payment in its petition herein cannot be classed as a current debt made in the ordinary course of business, as those terms seem generally to be understood, yet it appears that at the time when the contracts hereinbefore mentioned were entered into between said Lackawanna Company and the defendant railway company that the condition of the track of the defendant railway company was such that the demand for new rails upon the most worn portion of the roadway was practically imperative. For a number of years prior to December, 1882, only about 5,000 tons of new rails had been purchased. The road north from Houston for 90 miles was built in 1857, 1861, and thence northward to Denison, 1867–1872. The Western division leading to Austin was constructed in part prior to 1861, and completed in 1873, and the Waco division was completed about 1875. The condition of these roads was bad, except such portions as had been relaid with 5,000 tons of rails purchased prior to December 28th, 1882. There was continual breakage of rails and wrecking of trains, the track was unsafe, and was generally so regarded, not only by "railroad men," but by the traveling public; the damage to merchandise, rolling stock, &c., was continuous, and the need for new rails appears to have been "absolutely necessary as a preservation of human life, the loss of which was liable to occur at any moment."

I find that when the aforesaid contracts were made with the said Lackawanna Company both seller and buyer expected the debts to be paid from the net income of the railway; that the credit
657 extended under said contracts was at the request of and for the accommodation of the defendant railway company and upon its general credit. That said sales were made without any stipulation that security should be given by the defendant company

for said rails, or that payment therefor should be made out of any particular fund or in any particular way; that said sales were for an unusually large amount of rails and the defendant was unable — pay cash therefor, and there was no other way of obtaining said rails except upon credit; and petitioner herein at the time of said contracts and sales had knowledge of the mortgage of June 16th, 1873, given by the defendant railway company upon the properties of its Waco & Northwestern division to secure the first-mortgage bonds, which said mortgage has been herein foreclosed.

I find that the steel rails supplied by said Lackawanna Company under the aforementioned contracts, 18,581 tons were placed in the track of the defendant railway company as soon as received.

VII.

I find that the bonded debt of the defendant railway company, January 1st, 1885, was as follows:

1st mortg. main line, 7 per cent	$6,262,000
" " West. div'n	2,270,000
" " Waco & N. W. div., 7 per cent	1,140,000
Consolidated M. L. & West. div., 8 per cent	4,118,000
" Waco & N. W. div., 8 per cent	84,000
General mortgage 6 per cent	3,000,000
Income and indemnity	500
Total	$16,874,500

VIII.

I find that interest on all classes of the above bonds payable in 1884, amounting to $1,194,200, was paid as it matured, and that defendant railway company first defaulted in the payment of interest on its bonds January 1st, 1885, when it failed to pay the interest, amounting to $333,760, due on that date upon its first-mortgage bonds.

658 IX.

I find that the Southern Development Company, a body corporate under the laws of the State of California, did, on or about the 16th day of February, 1885, file its bill of complaint in this honorable court against said defendant company, which said bill is known as No. 185 of the equity docket of your honorable court, wherein said company set forth the various mortgages and encumbrances upon the railway and other property of said defendant company, together with various other encumbrances upon the property of said defendant railway company.

That said company by its said bill alleged that said Houston & Texas Central Railway Company was indebted to it in the sum of about six hundred thousand dollars, for money loaned at various times; that said company sought to enforce and effect payment of its said claims, and, among other things in said bill, alleged and set forth the embar-assed condition of said railway company—the fact

that its various creditors were pressing for payment, and its property was in danger of being scattered, wasted and lost to its creditors, and prayed that this honorable court would take possession of said property by appointment of receivers thereof, and might be pleased to decree that out of the rents, revenues, issues and profits coming into the hands of said receiver, or receivers, after the payment of all costs of administration and operating expenses of said railway and necessary expenses for equipment and repair thereto, the claims of said Southern Development Company, together with interest and costs, might be paid and satisfied.

X.

I find that said Southern Development Company, in its said bill, moved this honorable court to appoint receivers of all of the property of said defendant railway company, and this honorable court did, thereupon, on or about the 21st day of February, 1885, appoint Benjamin G. Clarke and Charles Dillingham as receivers of all the property of said railway company, in the manner and form as set forth in the order appointing said receivers in the record of said suit No. 185, and of which order a copy is filed with these findings marked "document D."

659

XI.

I find that said Southern Development Company did thereafter, to wit: on or about the 18th day of April, 1885, file its amended and supplemental bill, whereby it made Nelson S. Easton and James Rintoul, and The Farmers' Loan & Trust Company defendants in said bill in their capacities as trustees of the various mortgages upon the property of the defendant railway company, and that said company by said amended and supplemental bill further prayed:

(1.) That an account might be taken under the direction of your honors, of the several amounts due to it by said Houston and Texas Central Railway Company, as also of all sums respectively due to all the other parties, creditors of said company, who might join it in the prosecution of said suit, or who might intervene therein for the protection of their claims.

(2.) That an account might be taken under the directions of this honorable court, as to dates and amounts of money paid by said defendant company to any of the mortgages in said various deeds of trust, or to any holders of the bonds issued under the said deeds of trust, and the different times when paid, amounts paid for interest on the said bonds, and on which of the said bonds, as well as all moneys paid into the sinking fund specified in said mortgages and deeds of trust, and what amounts arising out of the sale of any of the lands, or town lots, or other real estate belonging to said railway company, had been paid to said bondholders or deposited in trust for their benefit, and that said amount might be taken so as to show to this honorable court at what time or times, and what proportion of the said amounts were paid out of the current reve-

nues of said company, in the absence of any earnings, and what amounts and proportion were so paid out of the net earnings of said defendant railway company.

(3.) That an account might be taken of all items and incumbrances upon said property of said railway company, showing the amount and rank of each, and the property affected by each, and also an account of all the assets of every kind and nature belonging to the said railway company.

660 (4.) That for the amounts found due on such accounting to the said Southern Development Company, and all intervening similarly situated persons, there might be a decree against the said railway company and against all the defendants declaring that the sums so due were liens upon the net earnings of said railway company, and upon all of its property, superior in rank to the claims of said trustee, and of the mortgage bonds and coupons issued under the said various deeds of trust; that the net earnings of said railway company, in the hands of the receivers appointed in said cause, should be first devoted to the payment of the amounts so decreed, and that if there should not be found sufficient within a reasonable time, to pay said amounts, then that a sale of the property and assets of said railway company might be ordered and had, in such manner and under such terms and conditions as might be to the best interest of all parties concerned, and that out of the proceeds of said sales the amounts so due to said Southern Development Company might be first paid in preference to any amounts due on said mortgage bonds and coupons issued under the various deeds of trust upon the property of said railway company.

(5.) And further praying that should the sale of said defendant railway company's property be required to satisfy the decree of this honorable court, then that said sales should be made in the manner and form as in said bill and supplemental bill set forth.

XII.

I find that said Clarke & Dillingham, so appointed receivers of the property of said railway company, immediately upon said appointment, qualified as receivers, took possession of the property thereof, entered upon the discharge of their duties as such receivers, and continued to act as such until the 10th day of July, 1886, or thereabouts, when they delivered possession of all the property of said railway company then in their possession, as also of all revenues of the same which then remained in their hands to Nelson S. Easton and James Rintoul and Charles Dillingham, who had prior to said 10th day of July, 1886, been appointed joint receivers of said railway company, under bills of complaint filed by the trustees

661 of certain mortgages upon the main line & Western division of said Houston & Texas Central railway, and also by the Farmers' Loan & Trust Company as trustee of the general mortgage of said Houston & Texas Central Railway Company, and upon their application, in manner and form, and under the circumstances, set forth in the record of cause No. 198 of the docket of this honorable court, and as hereinafter more fully set forth.

XIII.

I find that said bill and said supplemental bill so filed by said Southern Development Company, were by it filed in its own behalf, and in behalf of all other persons similarly situated who might intervene in said suit to protect their own interests, and that said Lackawanna Company did, by permission of this honorable court, file its petition of intervention in said cause No. 185 on or about the 12th day of September, 1885, by which petition it prayed that it might be allowed to intervene for its interest and join complainant and become itself a party complainant to said bill against all of the defendants; and whereby said Lackawan-a Company further prayed in all respects as was prayed by complainant, The Southern Development Company, in its bill and supplemental bill of complaint, and further prayed that an account might be taken of the sum due by the defendant to said Lackawan-a Company on the contracts hereinabove set forth, and that your honors might decree that the sum found due, with interest, might be ordered to be paid out of the net revenues of the defendant company, and might be declared a lien thereon, and upon all the property of said company, superior in rank to the claims of the trustees, complainants in this bill, and to the mortgage bonds and coupons issued under their various deeds of trust. And whereby said Lackawan-a Company further prayed for general relief and all such further orders and decrees as might be necessary and proper in the premises.

XIV.

I find that to said bill of said Southern Development Company, so filed, Nelson S. Easton and James Rintoul, trustees, filed
662 their general and special demurrers, which were by this honorable court sustained, and the whole of said bill and supplemental bill of complaint dismissed, with costs, on the 27th day of May, 1886, but without prejudice to the rights of complainants to assert their claims, if any they had, in such manner as they might be advised; and that said receivers, Clarke and Dillingham, were by said decree discharged and ordered to turn over all the property and effects of said railway company, together with all of its accrued revenues in their possession to Nelson S. Easton and James Rintoul and to Chas. Dillingham, all of whom had been appointed joint receivers of said railway company in the manner and form as hereinafter set forth, and upon the application of the trustees under the various deeds of trust annexed to the bills of foreclosure in said causes Nos. 198, 199 and 201.

XV.

I find that prior to the dismissal of said bill in said suit No. 185, said Easton and Rintoul and complainant herein, as trustees, had filed three several bills of complaint in foreclosure in this honorable court against various portions of the railway belonging to said defendant company, and which said bills are known as Nos. 198, 199 and 201 of the chancery docket of this honorable court, and were

filed upon the dates following, to wit: The bills in said causes Nos. 198 and 199 on or about the 21st day of January, 1886, and said bill in said cause No. 201 on or about the 18th day of April, 1886. That prior to the dismissal of said bill in said cause No. 185, this honorable court rendered an order consolidating said three causes Nos. 198, 199 and 201, and ordering that the said three causes so consolidated, should thereafter proceed and be known as "consolidated cause No. 198" of this honorable court, under the title of Nelson S. Easton and James Rintoul, trustees, and The Farmers Loan and Trust Company, trustee, *vs.* The Houston and Texas Central Railway Company, *et als.*, and that the complainants in said consolidated cause, prior to the dismissal of said bill in said cause No. 185 had caused the appointment of receivers under their bills in said consolidated cause, to which receivers this honorable court, as hereinabove set forth, ordered all the assets of said Houston and
663 Texas Central Railway Company, in the possession of said receivers, Clarke and Dillingham, to be turned over as aforesaid, on the 10th day of July, 1886, and that all of the property of said railway company remained in the possession of said joint receivers, Easton, Rintoul and Dillingham, until December 7th, 1888, or thereabouts, when said Easton and Rintoul were relieved from further duty and said Dillingham continued as sole receiver in the premises.

The bill so filed by complainant herein as trustee was as trustee under the general mortgage of the Houston and Texas Central Railway Company, a mortgage different from the one forming the subject-matter of the bill of foreclosure herein, which latter is commonly known as the "Waco & Northwestern Division first mortgage."

I further find that the three mortgages declared on in said causes Nos. 198, 199 and 201 were thereafter duly foreclosed, by final decree entered in said consolidated cause No. 198, on the 4th day of May, 1888, and on September 8th, 1888, all the property of said railway company was duly sold under said foreclosure decrees, by a commissioner appointed for that purpose, and at said sale George E. Downs became the purchaser of the Waco & Northwestern division, but his purchase was made subject to the mortgage foreclosed herein, and subject to the right which the court reserved by said decree to charge upon the property or any part thereof the payment of any amount that might be found to be due and payable by reason of intervening petitions theretofore filed in said cause and be entitled to priority over the mortgage debts referred to in said decree, of which said decree a certified copy is herewith filed and referred to.

XVI.

I find that from February 20th, 1885, to the present time, the property of the defendant railway company, forming the subject-matter of the receivership in this cause has continuously been in the possession of this court under proceedings in said suit No. 185, and thereafter in suits Nos. 198 and 227.

I find that no interest has been paid on the bonded indebtedness

by either of the receivers in this cause. I find that Alfred
664 Abeel, receiver in this cause, has expended under the orders of this court $46,505.40, for betterments and permanent improvements, from December 10th, 1892, to September 3rd, 1895, consisting of bridges, shops and round-house, car shed, water stations, locomotives, chair car and fencing.

I find that no part of the income arising from the operation of the road and no part of the proceeds of sales of old rails, old iron, old cars and engines, which was received by the receivers in causes Nos. 185 and 198, ever came into the possession of the receiver in this cause, and the evidence fails to show that any part of the new equipments purchased by the receivers in causes Nos. 185 and 198, as shown above, ever came into the possession of the receivers in this cause. The evidence fails to show that any improvements and betterments of the property added to the property of the Houston & Texas Central Railway Company by the receivers in causes Nos. 185 and 198, were made on the Waco & Northwestern division.

I find that prior to April 6th, 1889, no separate accounts were kept of the receipts and disbursements of the Waco & Northwestern division, but the same was operated as a branch of the general system of the Houston & Texas Central Railway Company, and the evidence fails to show what, if any, of the expenditures made by the receivers in causes Nos. 185 and 198 for extraordinary repairs, betterments and improvements, and for operating and running expenses were made for said Waco & Northwestern division, and what portion for other divisions of said Houston & Texas Central Railway Company; and this is true also as to receipts and incomes.

I find that the receivers in cause No. 185 had on hand in cash at the opening of business on January 21st, 1886, $175,393.65, but there is no evidence that any part of said fund came into the possession of the receivers in this cause.

I find that the receiver in cause No. 198 had on hand at the beginning of business on April 6th, 1889, cash amounting to $215,842.45, but the evidence does not show that any part of said funds came into the hands of the receivers in this cause.

XVII.

I find in the mortgage given by the Houston & Texas Cen-
665 tral Railway Company to the Farmers' Loan and Trust Company, trustee, dated June 16th, 1873, being the same mortgage declared on herein, the following provisions:

"And in case the said Houston & Texas Central Railway Company shall fail, to pay the principal, or any part thereof, or any installment of the interest, or any part thereof, on any of the said bonds at any time when the same shall become due and payable according to the tenor thereof, and for sixty days after having been demanded, it shall be competent for the said trustee, its successors or assigns, to enter upon the said railway and the premises and property herein conveyed, by its attorneys and agents, and take possession of the same without let or hindrance of the said first

party, and every part and parcel thereof, and the appurtenances, and appoint an agent to operate and manage the same, and receive the revenue and income thereof, applying the said funds after deducting taxes, necessary expenses and counsel fees, to keep the same in good order and repair, and the surplus to pay the principal and interest of all the bonds which may be due and outstanding, and secured hereby *pro rata*, and thereafter, to the payment of any contributions due to the sinking fund herein established. And upon the request of the holders of one-fifth in amount of the bonds so in default which may be at any time outstanding under this deed of trust, it shall be the duty of said second party by its president, or agent duly appointed in its behalf, to enter upon and take actual possession with or without entry or foreclosure of said railway and property herein described, and all and singular each and every part and parcel thereof, and assume its management until the arrears of both principal and interest be paid, or the property sold, as herein prescribed, receiving the rents, revenues and income thereof, and applying them in the same manner as above stated."

"It is however, expressly agreed that the said party of the first part may dispose of the current net revenues and income of all the said property and railway hereby conveyed in such manner as it shall deem best, until default shall be made in the payment of the interest or principal of said bonds, or of any one or more of them, and shall have the right to sell and dispose of any of such real estate or other property as it may own or acquire, which may
666 not be needed or required for the purposes and business of the said Waco & Northwestern division, except in the case of the six thousand acres per mile of completed road, and which sale and conveyance of such outside property shall transfer the said property and title free from encumbrance of this mortgage or deed of trust, and to change its tracks and make any and all alterations necessary for the benefit of the same."

I find that there is no provision in said mortgage, that the trustee may, if it acquired possession of said railway under said mortgage, pay any floating debt or debts of said company out of the gross earnings of said railway.

XVIII.

I find that during the receivership of Clarke & Dillingham, in said cause No. 185, they received from the operation of the railway company, revenues, and expended for operating expenses, taxes &c., the following amounts, to wit:

Amount received from February 23rd, 1885, to January 21st, 1886, two million seven hundred and fifty-eight thousand four hundred and eighty-seven & $\frac{40}{100}$ dollars	$2,758,487.40
Operating expenses, taxes &c., same period	2,137,322.44
Balance or surplus	$621,164.96

Amount received from January 21st to July 10th, 1886, one million one hundred and forty-three thousand seven hundred and thirty-one $\frac{05}{100}$ dollars	$1,143.731.05
For operating expenses, etc., for same period	1,341,753.85
Leaving a deficit for this period of	$198,022.80
And leaving a net balance from the operation of said railways from February 23rd, 1885, to July 10th, 1886 of	423,142.16

667 XIX.

I find that when said Clarke & Dillingham took possession of the property of the defendant railway company, on February 23rd, 1885, they received in cash	$30,416 34
That they collected assets of the company as follows, to wit:	
Traffic balances and other claims	118,730 08
Sales of old rails on hand February 23, 1885	110,275 00
Sale of old cars	6,500 00
Total	$265,921 42

XX.

I find that the receivers, Clarke & Dillingham, during the time when they were in possession of said property as receivers and said Easton and Rintoul and Dillingham, while they were in possession as receivers of said property, expended under orders of court the sums following, outside of operating expenses, to wit:

Amount expended in paying liabilities of the defendant railway company	$23,274 20
Interest paid upon the first-mortgage bonds, of the company, being interest due January 1st, 1885, to July 1st, 1885	751,438 15
Amount expended for new steel rails	245,793 64
Amount expended in payment of certain car-trust notes	125,695 44
Amount expended for new passenger coaches, baggage, mail & express cars, etc., & locomotives	265,696 33
Amount expended by said receivers for right of way, fencing track, real estate, depot, round-house, foundry and pattern-house at Houston	126,218 62
Total	$1,536,116 38
668 I find that of the amount expended, as above, was expended under the receivership of Messrs. Clarke & Dillingham.	384,026 20

The above statement shows receipts and expenditures up to January 9th, 1888, the date when Master Winter heard the evidence on this intervention in cause No. 198, but no proof has been offered before me showing the receipts and disbursements of the receivership in said consolidated cause since said hearing before said master on January 9th, 1888.

XXI.

I find that said Easton & Rintoul and Dillingham during their receivership realized out of proceeds of sale, or collection of old assets of the defendant company, the sum of $135,889.70.

XXII.

I find that the receivers in cause No. 198 received from the receivers in cause No. 185 the sum of $138,751.37 in cash.

I find that the receivers in consolidated cause No. 198 after they took possession of the assets of the railway company on July 10th, 1886, and up to the time of the filing of the report of Master Winter, paid liabilities of the receivers, Clarke & Dillingham, taxes, outstanding vouchers, pay-rolls, traffic balances, $221,421.32, and collected from the amount due said Clarke & Dillingham as receivers in cause No. 185, $39,016.69.

XXIII.

I find that said Lackawanna Company on November 26th, 1886, filed its petition of intervention in said cause No. 198, praying substantially for the same relief against all the railways, revenues, earnings, moneys, and other properties and assets of the defendant railway company, including those forming the subject-matter of the receivership herein, as is prayed for by its petition of intervention herein against said railways, revenues, earnings, moneys and other properties and assets of said company forming the subject-matter of the receivership in this cause.

669 I find that upon the petition of said Lackawanna Company, so filed in said cause No. 198, a report was duly filed by the Honorable Jno. G. Winter, special master in said cause, finding that under the facts of the case the debt for which said company filed its petition in said cause was of a character equitably entitling it to be discharged in preference to the debt embraced in the mortgages represented in said suit, but which preference should be applicable to so much only of the said company's debt as should remain unsatisfied after exhausting one hundred and seventy certain bonds pledged as security, as was recited in the report of the master in said cause, and recommending that a decree be entered accordingly. Said one hundred and seventy bonds were the same bonds hereinabove fully described under the second paragraph of these findings of facts—that is to say, they were one hundred and seventy-first mortgage five per cent. bonds of the Galveston, Harrisburg and San Antonio railway (Mexican & Pacific extension) of the face value of one thousand dollars each, or of $170,000 in all. Said master recommended that a decree be entered accordingly.

I find, as above, that The Farmers' Loan and Trust Company, trustee, complainant in said cause No. 198, did file exceptions to the report of said special master, so filed, but that said complainant has never brought said exceptions to a hearing, and that the same are still pending in this honorable court in said cause No. 198.

XXIV.

I find that the said Lackawanna Company did on the 30th day of April, 1889, file suit upon its said claim against the Houston & Texas Central Railway Company in the district court of Dallas county, in the State of Texas, a court of competent jurisdiction in the premises, that citation was issued in said suit May 1, 1889, and served on the 3d day of June, 1889, and judgment was rendered against the said railway company on May 17, 1889, for the full sum of $555,914.25, being the amount of its claim herein, with interest at six per cent. per annum up to the date of judgment, and that said judgment further provided that its amount should bear
670 interest at eight per cent. per annum from its date, to wit: May 17th, 1889, until paid; that execution was issued on said judgment August 19th, 1889, which was returned by the sheriff of Dallas county, Texas, August 20th, 1889, "not executed, there being no property found in Dallas Co. subject to execution."

I find that the notes sued upon had not been renewed or extended and the same are fully described in the certified copy of the record from the district court of Dallas county, Texas, filed with the evidence herewith returned into court and hereby referred to for description.

XXV.

I find that of the interest paid by the receivers on the first-mortgage bonds of the defendant railway company, and hereinabove referred to, the amount of $79,800.00 consisted in coupons upon the first-mortgage bonds of the defendant company secured by mortgage upon the Waco & Northwestern division of said company, being the property forming the subject-matter of the litigation herein; and I further find that said interest was paid with interest upon the coupons representing the same, which interest aggregated $11,571.00, making a total amount of interest paid to holders of bonds secured by mortgage on the Waco & Northwestern division of the Houston & Texas Central Railway Company of $91,371.00, which sum was paid on or about the first day of May, 1887.

These are the interest payments falling due January 1, 1885, and July 1, 1885, and the accrued interest on the coupons representing said interest to the date of payment.

XXVI.

I find that the Pacific Improvement Company, a corporation organized under the laws of the State of California, has during the pendency of the proceedings herein acquired all the rights and claims of the Lackawanna Iron and Coal Company by assignment from said company.

XXVII.

I find that on February 16th, 1895, the Southern Development Company filed its original bill of complaint cause No. 185,
671 and that the only parties to said bill were the above complainants, and The Houston and Texas Central Railway Company as defendant, and on February 20th, 1885, on said original bill this court appointed Clark & Dillingham receivers of all the property of said railway company.

I find that the complainant in said bill sets forth the various mortgages given by the said railway company upon its main line and branches, and among other mortgages mentioned in said bill is the mortgage, dated June 16th, 1873, given by the Houston & Texas Central Railway Company to the Farmers' Loan & Trust Company on the Waco & Northwestern division, and being the same mortgage declared on herein.

I find that it is alleged in said bill that Easton & Rintoul, trustees in the first mortgage on the main line and the first mortgage on the Western division, and the Farmers' Loan & Trust Company, trustee in the mortgage declared on herein, are all citizens of the State of New York, and that none of said trustees are to be found in this district, and for that reason complainant was unable to make them parties thereto, but prayed the right to make said trustees parties in case they should come within the jurisdiction of the court.

I find that after the appointment of said receivers and on the 20th day of April, A. D. 1885, complainant filed an amended and supplemental bill in said cause No. 185, making Easton & Rintoul, trustees, and The Farmers' Loan & Trust Company, trustee, and Benjamin A. Shephard additional parties defendant, which supplemental bill avers, among other things, that the said Farmers' Loan & Trust Company was trustee in the mortgage declared on herein.

I find that on March 31st, 1885, prior to the filing of said supplemental bill of complaint, the Farmers' Loan & Trust Company filed its petition in said cause No. 185, praying to be made a party thereto, averring, among other things, that it was trustee under several separate mortgages executed by the defendant railway company, and naming among them the mortgage declared on herein. The prayer of said petition was granted, and on April 6th, 1885, this court entered an order in said cause No. 185, allowing the
672 said Farmers' Loan & Trust Company to become a defendant in said suit, and further ordered that it may demur, plead or answer therein on or before the rule day in June, 1885.

I further find that on June 15th, 1885, said Farmers' Loan & Trust Company filed its answer as defendant in said cause No. 185 in answer to the original bill and the supplemental bill of said complainant.

I find that the averments of said answer are all defensive to the said original and amended bill of complaint, and I find that the above are the only pleadings and the only appearance that was made by the said Farmers' Loan & Trust Company in said cause No. 185, and it does not appear from said answer that said Farmers' Loan &

Trust Company, as trustee for any of the mortgages mentioned in said answer, either demanded of the court that said receiver should hold the property from said trustee or in any other manner demand affirmative relief under said mortgages or either of them. That its appearance in said cause No. 185 was simply that of a defendant in opposition to the rights asserted in the original and supplemental bill of complaint.

I find that on October 5th, 1885, Easton and Rintoul, trustees, having become parties defendant to said cause No. 185, filed demurrers to the original and supplemental bills filed therein, and on, to wit, May 27th, 1886, said demurrers came to be heard and were in all things sustained, and the entire original bill and supplemental bill *was* dismissed.

That prior thereto, on, to wit, May 26th, 1886, on motion of the Houston & Texas Central Railway Company to consolidate said causes Nos. 183, 184, 188, 198, 199 and 201, the following order was made:

"Upon consideration thereof it was ordered, adjudged and decreed, and the court doth order, adjudge and decree, as follows, all the parties consenting thereto in open court: That no further proceedings be had in causes Nos. 183, 184 and 188 without notice to the defendant railway company; that causes Nos. 198, 199 and 201, above named, be consolidated under No. 198 under the name and style of Nelson S. Easton and James Rintoul, trustees, and The Farmers' Loan and Trust Company, trustee, against The
673 Houston and Texas Central Railway Company and Benj. A. Shepard, trustee, consolidated cause; that in said cause Easton & Rintoul shall stand as complainants, as trustees under the mortgages or deeds of trust, made by the defendant railway company, bearing date respectively July 1st, 1886, and December 21st, 1870; that the Farmers' Loan and Trust Company, expressly assenting thereto, shall stand as complainant, as trustee under the mortgages or deeds of trust made by defendant railway company, bearing dates respectively June 16th, 1873, October 1st, 1872, May 1st, 1875, and April 1st, 1881, and that Benj. A. Shepard as defendant, as trustee under the mortgage or deed of trust made by said defendant railway company, bearing date May 7th, 1877; that the bills filed in said causes Nos. 198, 199, and 201 shall stand as bills in said consolidated cause, and may be amended by either complainant as they may be advised by the August rule day, and that any party hereto may file an answer to such original or amended original bills as he may be advised within thirty days after said August rule day."

I find that no other action was taken in said causes Nos. 183, 184, and 188 since the order above mentioned was made, but that consolidated cause No. 198 proceeded to final judgment, and the three mortgages declared on therein were in all things foreclosed, and I find that while the Farmers' Loan and Trust Company, trustee, in the mortgage declared on herein, expressly assented to stand as complainant in consolidated cause No 198, that it filed no bill of complaint therein.

I find that on 21st day of March, 1887, said Farmers' Loan & Trust Company filed an answer to the petition of Nelson S. Easton and James Rintoul *filed* the said cause No. 198, wherein and whereby said Farmers' Loan & Trust Company, as trustee under the Waco & Northwestern mortgage prayed the court that any order which should be made in said cause No. 198 directing the payment by the receivers out of the surplus of net earnings in their hands of any coupons falling due under any of the trust deeds by said railway company, might order and provide for payment by the receivers out of the surplus of net earnings in their hands of the two coupons due under the said Waco & Northwestern division trust deed as well as under the said other first mortgage.

674 I find that said application of said Easton & Rintoul, as also an application of the Farmers' Loan & Trust Company, as trustee, for the payment of interest coupons on the bonds secured by first mortgages or deeds of trust, described in the bills of complaint in said consolidated cause came on to be heard on the 27th day of April, 1887, when the order was rendered by this honorable court, that the coupons due January 1st, 1885, and July 1st, 1885, upon said first-mortgage bonds of the Waco & Northwestern division of the Houston & Texas Central Railway Company should be paid with interest upon said coupon due January 1st, 1885, from January 1st, 1885, until May 1st, 1887, at the rate of six per cent. per annum and with interest upon one half of the coupon due July 1st, 1885, from said last-named date until May 1st, 1887, when the same was ordered to be paid, and upon the remaining one-half of said coupon until it should have been paid. I find that said two coupons were pursuant to said order duly paid.

I find that said order expressly declared that it was "without prejudice to the rights of defendant or of any intervenor in this cause, or any final decree to be rendered in the same, nothing herein being decided as to the merits of the claim of the defendants, or of intervenors, and this order not in any manner stopping or affecting the rights of any party or intervenor in this cause."

I find that said Farmers' Loan & Trust Company, as trustee of the first mortgage of the Waco & Northwestern division of the Houston & Texas Central Railway Company, also filed petitions in this honorable court on the 6th day of November, 1888, and on the 20th day of November, 1888, for the payment of the remaining coupon interest due on the first mortgage of the Waco & Northwestern division, upon which said petition no order was ever rendered.

I find that by the final decree rendered in said cause No. 198, on the 4th day of May, 1888, this honorable court expressly reserved the right to charge the property under said decree ordered to be sold with any amounts that it might decree in favor of any interventions then on file, and that the intervention of the said Lackawanna Company was on file at the time of said decree.

675 I further find that the Waco & Northwestern division under the sale in 198 sold for the sum of $25,000.00, subject to the mortgage declared on herein, which $25,000.00 was paid in by the purchaser, Geo. E. Downs, to the master commissioner at the

time of his said purchase. That the bondholders secured by the mortgage declared on herein received no part of the proceeds arising from the sale of said road, or any part thereof, under the final decree rendered in said cause No. 198.

I find that subsequently to said decree, to wit, on the 20th day of April, 1889, said Lackawanna Company filed its petition in said cause No. 198, asking that the receivership therein should continue and remain over the property then in the possession of the court, being the property now in the hands of the receiver in this cause, until the claims and demands of said Lackawanna Company upon said property should have been finally decreed upon, and if decreed in its favor should have been finally paid and settled; and further praying the court to render a preliminary order staying the order which had theretofore been rendered directing the delivery of said property to one George E. Downs, who had become the purchaser thereof, and directing the receivers not to deliver the said property to any purchaser until after the final hearing of the matter of said petition.

I find that upon said petition an order was rendered directing the said George E. Downs, and The Farmers' Loan & Trust Company, complainant therein, to show cause why the relief therein prayed for should not be granted; and further directing the receiver to retain possession of said property until the further order of the court; and further ordering that the receivership which had theretofore been ordered in this cause should be concurrent with the original receivership ordered in said cause No. 198, and that the receiver should keep separate accounts of the earnings and expenses of the Waco & Northwestern division of the Houston and Texas Central railway.

XXVIII.

I take the account prayed for in the petition of said Lackawanna Company as follows, to wit:

676 1st. The amounts due to said Lackawanna Company by said Houston & Texas Central Railway Company are the following, to wit:

$20,000.00	Due	January	23rd,	1885
20,000.00	"	"	28th,	"
12,000.00	"	February	19th,	"
20,595.97	"	"	24th,	"
31,439.72	"	"	26th,	"
17,130 88	"	"	28th,	"
9,233.27	"	March	2nd,	"
21,000.00	"	"	2nd,	"
15,000.00	"	"	3rd,	"
17,526.71	"	"	15th,	"
32,281.25	"	"	17th,	"
21,154.37	"	"	22nd,	"
13,791.17	"	"	25th,	"
25,294.58	"	April	7th,	"
15,478.14	"	"	21st,	"

10,000.00	"	"	22nd, "
20,121.62	"	"	23rd, "
17,888.47	"	"	24th, "
10,000.00	"	"	25th, "
10,000.00	"	"	27th, "
22,539.95	"	"	28th, "
3,788.81	"	May	8th, "
18,936.19	"	"	11th, "
19,480.11	"	"	11th, "
20,494.29	"	"	21st, "

Or a total of $445,175.50

I find that said indebtedness has been liquidated by the judgment of said district court of Dallas county at the sum of $555,914.25, with interest at eight per cent. per annum from May 17th, 1889, until paid.

2nd. I find that during the years 1883 and 1884 the defendant paid $2,386,400.00 interest upon its bonds, which amount, less $1,043,198.27, which seems to have been borrowed for interest purposes in those years, was presumably (it not appearing otherwise), paid from its income or current earnings, and that out of said total the sum of $159,600.00 was paid as interest upon the first *first*
677 mortgage bonds of the Waco & Northwestern division, being the bonds forming the subject-matter of the bill of complaint in this cause. That said amounts were paid at or about the dates when said interest became due; that is to say, $39,900.00 on or about the 1st day of January, 1883; a like sum on or about the 1st day of July, 1883; a like sum on or about the 1st day of January, 1884, and a like sum on or about the 1st day of July, 1884. That during 1883 and 1884, two and a quarter million dollars approximately was expended from the earnings and general income of the defendant company's property in the payment of interest on bonds and in additional equipments, permanent improvements, etc.

I find the gross earnings, operating expenses and taxes, extraordinary repairs, renewals and equipments, interest on the funded or bonded debt, and other matters relating to the income and expenditures of the defendant railway company during the years 1874 to 1884 inclusive to have been as per table annexed to and made a part of this finding.

678 & 679	1874.	1875.	1876.	1877.	1878.	1879.	1880.	1881.	1882.	1883.	1884.
Gross earnings	2,784,208 76	3,156,396 23	2,902,396 23	1,905,326 41	2,020,996 64	3,205,684 88	3,741,000 37	3,748,655 10	3,156,517 51	3,251,875 89	2,547,847 40
Operating expenses & taxes	2,002,341 42	1,935,063 70	1,855,207 26	1,127,512 00	1,752,038 94	1,773,771 27	2,007,323 35	2,141,870 22	1,748,904 36	1,743,771 28	1,578,190 15
Extraordinary repairs, renewals & equipment	190,554 55	146,886 38	193,828 95	34,105 96	36,953 04	43,507 13	181,797 63	1,063,115 91	549,207 90	782,791 12	641,920 38
Total	2,192,895 97	2,081,950 08	2,049,036 21	1,161,617 96	1,788,991 98	1,817,278 40	2,189,120 98	3,204,986 13	2,298,112 26	2,526,562 40	2,220,110 53
Interest on floating debt	251,771 40	228,070 50	276,118 74	115,153 78	187,275 08	160,064 24	69,056 10	31,939 09	53,858 12	62,394 79	86,130 21
Interest & principal, State debt	61,502 17	62,198 20	59,233 87	53,187 70	52,109 79	47,606 56	43,227 62	42,369 30	41,524 29	40,697 95	39,888 10
Total	313,272 57	290,268 70	335,352 61	168,341 48	239,384 87	207,670 80	112,283 72	74,308 39	95,382 41	103,092 74	126,018 31
Surplus	278,040 22	784,087 36	517,917 41	575,367 07	892,619 79	1,180,735 68	1,439,595 67	469,360 58	763,022 84	622,220 75	201,718 56
Interest on funded debts	859,304 43	877,189 60	1,168,863 94	988,165 00	1,068,315 00	1,098,150 00	1,118,200 00	1,140,200 00	1,193,200 00	1,193,200 00	1,193,200 00
Surplus over interest on bonded debt						112,585 68	321,395 67				
Deficit over interest on bonded debt	581,264 21	93,102 24	650,946 53	412,797 93	175,695 21			670,839 42	430,177,16	570,979 25	991,481 44
Floating debt at close of year	1,961,915 60	1,750,957 41	2,062,128 38	2,338,813 97	4,094,997 62	2,573,661 01	1,957,060 07	2,214,765 27	2,628,543 68	2,705,973 21	3,584,251 30

680 I further find that the accounts of said railway company were not kept in such a manner as to indicate the exact fund out of which the interest on said first-mortgage bonds of the Waco & Northwestern division were paid or the exact fund out of which the interest upon the bonds of the other divisions was paid, and that no separate account was kept of the net earnings of said Waco & Northwestern division as distinguished from the net earnings of the other divisions of said railway company either prior to or during the receivership thereof until April 20th, 1889, or thereabouts.

I find that during the receivership in said cause No. 198 the receivers expended in the payment of interest upon the bonds of the issue forming the subject-matter of the bill of foreclosure herein the sum $79,800.00, being the amount of the coupons due upon said bonds January 1st, 1885, and July 1st, 1885, and that interest was paid upon said coupons, so that the total amount paid out by said receivers for interest on said bonds amounted to the sum of $91,371.00.

3rd. The facts in reference to the other matters of account prayed for in the petition are fully set forth in the previous findings.

Respectfully submitted.

WM. L. PRATHER,
Special Master.

Indorsements: "No. 227. Equity. Intervention No. 4. Master's No., 68. Farmers' Loan & Trust Co. *vs.* The Houston & Texas Central R'y Co. *et al.* Master's report upon intervention of Lackawanna Iron & Coal Co. Filed January 13, 1896. C. Dart, clerk, by Geo. H. Burnett, deputy."

Decree, February 26, 1896.

FARMERS' LOAN AND TRUST COMPANY, Complainant, *v.* HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY *et al.*	}	Eq. No. 227.

681 In the United States Circuit Court for the Eastern District of Texas, at Galveston.

In the Matter of the Intervention of the Lackawanna Iron and Coal Company and the Pacific Improvement Company.

This day this cause coming on to be heard upon the report of the special master, William L. Prather, to whom this intervention was referred by an order of the court herein entered on the 31st day of October, 1891, under which order the said special master was directed to take accounts in said petition prayed for and to investigate and to find and report upon the facts as to the subject-matter of the said petition and the answers thereto, and the matter having been argued by counsel and duly considered by the court, it is ordered,

adjudged and decreed by the court that the report of the said special master, William L. Prather, on this intervention herein filed on the 13th day of January, 1896, be and the same is hereby confirmed.

And this cause coming on further to be heard upon the said intervention and upon the exceptions and answer thereto of the complainant and upon the answer and exceptions of the intervenors, Moran Brothers and Henry K. McHarg, as well upon the pleadings and evidence, and argument being had thereupon, it is further ordered, adjudged and decreed that said intervention of the said Lackawanna Iron & Coal Company and Pacific Improvement Company be and the same is hereby dismissed without prejudice to the right of the said Lackawanna Iron & Coal Company and Pacific Improvement Company, under or by virtue of its intervention in equity cause No. 198, entitled Easton and Rintoul *v.* Houston & Texas Central Railway Company. And it is further ordered, adjudged and decreed that the intervenor pay all costs of this intervention.

D. E. BRYANT, *Judge.*

Indorsements: "No. 227. Eq. (Int. No. 4.) The Farmers' Loan & Trust Co. *vs.* The Houston & Texas Central R'y Co. Decree upon petition of Lackawanna Iron & Coal Co. & Pacific Improvement Co. Filed Feb'y 26, 1896. C. Dart, clerk."

682 *Motion and Order on Appeal, Feb'y 26, 1896.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

FARMERS' LOAN AND TRUST CO., Trustee, Complainant, *vs.* THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY *et al.*, Defendants; Lackawanna Iron & Coal Co. and Pacific Improvement Co., Intervenors.	No. 227.	In Chancery.

On motion of E. B. Kruttschnitt, solicitor for the Lackawanna Iron & Coal Company and the Pacific Improvement Company, intervenors in the above-entitled cause, made in open court, and suggesting to the court that there is error to their prejudice in the final decree rendered and entered at the present term of this honorable court dismissing the intervention originally filed in this cause by said Lackawanna Iron & Coal Company, and thereafter joined in by said Pacific Improvement Company, and that your intervenors are desirous of appealing therefrom to the United States circuit court of appeals for the fifth judicial circuit, said appeal to operate as a supersedeas, and that intervenors file herewith an assignment of errors as part hereof:

It is ordered by the court, in open court, that an appeal be, and the same is hereby allowed to said above-named intervenors from the decree dismissing the above described intervention. Said appeal

to be to the United States circuit court of appeals for the fifth judicial circuit, returnable within thirty (30) days from this date, and the bond for said appeal is hereby fixed at the sum of $1,000 and said appeal shall operate as a supersedeas.

D. E. BRYANT, *Judge.*

683 In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

FARMERS' LOAN & TRUST CO., Trustee, Complainant, *vs.* THE HOUSTON & TEXAS CENTRAL RAILway Company *et al.*, Defendants; Lackawanna Iron & Coal Co. and Pacific Improvement Co., Intervenors.	No. 227.	In Chancery.

Assignment of Errors Made Part of Motion of Appeal.

Now come The Lackawanna Iron & Coal Company and The Pacific Improvement Company, appellants from the decree dismissing the intervention originally filed in this cause by the Lackawanna Iron & Coal Company, and thereafter joined in by the Pacific Improvement Company, and assign error in the decree herein rendered against them as follows, to wit:

First. The said decree is erroneous in denying the relief herein prayed for by intervenors, and in dismissing the intervention herein.

Second. That the claim of intervenors is one made for materials and supplies necessary to keep the railways forming the subject-matter of the foreclosure herein a going concern from day to day. That a continuance of the running of said railway involved the interests of the public, the traffic of the road, and the continuance of the franchises of the defendant railway company herein, and that said supplies added to the value of the property mortgaged to complainant herein, and the debt incurred for the same was and is entitled to preference both upon the revenues of the railways forming the subject-matter of this cause, and upon the corpus of the same, over the claims of complainant herein, and that this honorable court erred in not so holding, and in not decreeing in favor of intervenors as in their intervention prayed for.

Third. That the income of the railways forming the subject-matter of the bill of foreclosure in this cause, both prior to the filing of complainant's bill of foreclosure herein and subsequent thereto, and both prior to and subsequent to the taking possession of said
684 railways by this honorable court, was used for the payment of interest upon complainant's mortgage and for permanent improvements upon said railways and was diverted for the benefit of complainant herein and of the holders of bonds described in the mortgage forming the subject-matter of the bill of foreclosure herein, and at the expense of the current debt fund, and that intervenors are entitled to a restoration to the extent of such diversion of said

current debt fund, and that this honorable court erred in not decreeing such restoration and in not decreeing in favor of intervenors upon the current debt fund when thus restored.

Fourth. That the debt of intervenors is entitled to a lien upon the revenues of the defendant railway company in the possession of this honorable court, both under the laws of the State of Texas, and under general principles of equity jurisprudence, and that both under said laws and under said jurisprudence intervenors are entitled to a payment of their claim out of said revenues with priority over the claim of complainant herein and that this honorable court erred in not so holding and ordering.

Wherefore intervenors pray the judgment of the circuit court of appeals on these errors, and for a reversal of the decree appealed from, and for a decree in their favor as by them in their intervention prayed for.

FARRAR, JONAS & KRUTTSCHNITT,
Solicitors for Intervenors, The Lackawanna Iron & Coal Company and The Pacific Improvement Company.

Indorsements: "Eq. 227. Int. No. 4. The Farmers' Loan & Trust Co. *v.* The Houston & Texas Central R'y Co. *et al.* Assignment of errors of Lackawanna Iron & Coal Co. and Pacific Improvement Co. and order allowing appeal. Filed Feb'y 26, 1896. C. Dart, clerk."

Bond on Appeal.

Know all men by these presents that we, The Lackawanna Iron and Coal Company and The Pacific Improvement Company, as principal, and —— ——, as sureties, are held and firmly bound unto
685 the Farmers' Loan and Trust Company, as trustee; Moran Brothers, Henry K. McHarg, Collis P. Huntington, E. H. R. Green, George E. Downs, Charles Dillingham, as receiver, the Southern Development Company, Morgan's Louisiana & Texas Railroad and Steamship Company, J. D. Knapp, and W. F. Boyle (all hereinafter referred to and designated as "the said obligees") in the full and just sum of one thousand dollars, to be paid to the said obligees, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of February, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas, lately at a regular term of the United States circuit court in and for the eastern district of Texas, at Galveston, in a suit depending in said court, between the Farmers' Loan and Trust Company as complainant and George E. Downs and Charles Dillingham, receiver, as defendants, and Moran Brothers, H. K. McHarg, Collis P. Huntington, E. H. R. Green, Lackawanna Iron and Coal Company, Southern Development Company, Morgan's Louisiana & Texas Railroad and Steamship Company, Pacific Improvement Company, J. D. Knapp and W. F. Boyle, as intervenors, a decree was rendered

denying the relief sought by said Lackawanna Iron and Coal Company and Pacific Improvement Company, intervenors, and dismissing their intervention; and the said Lackawanna Iron and Coal Company and Pacific Improvement Company having obtained an order of appeal in open court upon the same day and at the same term at which said decree was rendered to reverse the said decree in the aforesaid suit, and said appeal being to the United States circuit court of apppeals for the fifth circuit, to be holden at New Orleans, Louisiana, within thirty days from the date thereof:

Now, the conditon of the above obligation is such, that if the said Lackawanna Iron and Coal Company and Pacific Improvement Company shall prosecute their said appeal to effect, and answer
686 all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.] LACKAWANNA IRON & COAL COMPANY & PACIFIC IMPROVEMENT COMPANY,
By E. B. KRUTTSCHNITT, *Their Solicitor.*
[SEAL.] SAM. ALLEN.
[SEAL.] WM. D. CLEVELAND.

Approved by—
D. E. BRYANT, *Judge.*

March 2nd, 1896.

Oath to be Taken by Surety.

I, Sam. Allen, do swear that I am worth, in my own right, at least the sum of five thousand dollars, after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances on my property which are known to me; that I reside in Harris county, State of Texas, and have property in said State liable to execution worth five thousand dollars or more.

SAM. ALLEN, *Surety.*

Sworn to and subscribed before me, this the 29th day of February, A. D. 1896.

As witness my hand and official seal.

[SEAL.] JNO. H. McCLUNG,
Notary Public, Harris County, Texas.

Oath to be Taken by Surety.

I, Wm. D. Cleveland, do swear that I am worth, in my own right, at least the sum of five thousand dollars, after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances on my property which are known to

me; that I reside in Harris county, State of Texas, and
687–824 have property in said State liable to execution worth five thousand dollars or more.

WM. D. CLEVELAND, *Surety.*

Sworn to and subscribed before me this the 29th day February, A. D. 1896.

As witness my hand and official seal.

[SEAL.] JNO. H. McCLUNG,
Notary Public, Harris County, Texas.

Indorsements: "Int. No. 4. No. 227, equity docket. United States circuit court, eastern district of Texas, at Galveston. Farmers' Loan & Trust Company, as trustee, complainant, *vs.* The Houston & Texas Central Railway Company *et al.*, defendants. Bond on appeal of Lackawanna Iron and Coal Co. & Pacific Improvement Company. Filed this the second day of March, A. D. 1896. C. Dart, clerk, by W. L. Hanscom, deputy."

825–839 In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, in the fifth circuit and district aforesaid, do hereby certify the foregoing to be a true and correct copy of the record, assignments of errors and all proceedings in the interventions of the Lackawanna Iron and Coal Company, the Southern Development Company, the Morgan's Louisiana and Texas Railroad and Steamship Company, the Pacific Improvement Company, Collis P. Huntington, George E. Downs and E. H. R. Green, in cause No. 227 on the chancery docket of said court, entitled The Farmers' Loan and Trust Company, trustee, *vs.* The Houston and Texas Central Railway Company, Charles Dillingham, receiver, and George E. Downs, as the same now appears on file and of record in my office.

To certify which, witness my hand and the seal of said court, at Galveston, in said district, this 30th day of April, A. D. 1896.

[SEAL.] C. DART,
Clerk U. S. Circuit Court, Eastern District of Texas,
By W. L. HANSCOM, *Deputy.*

840 PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

Argument.

November Term, 1896.

TUESDAY, *January 5th*, 1897.

(Extract from Minutes.)

THE LACKAWANNA IRON & COAL COMPANY ET AL.
vs.
THE FARMERS' LOAN & TRUST COMPANY ET AL. } No. 503.

This cause came on to be heard this day, and after argument by Mr. E. B. Kruttschnitt, for appellants, the further hearing was continued until tomorrow.

Argument and Submission.

November Term, 1896.

WEDNESDAY, *January 5th*, 1897.

(Extract from Minutes.)

THE LACKAWANNA IRON & COAL COMPANY ET AL.
vs.
THE FARMERS' LOAN & TRUST COMPANY ET AL. } No. 503.

This cause came on to be heard, and was submitted to the court after further argument by Mr. E. B. Kruttschnitt, for appellants, and by Mr. L. W. Campbell, for appellees, Moran Bros. and McHarg.

Decree of Affirmance.

November Term, 1896.

THURSDAY, *February 25th*, 1897.

(Extract from Minutes.)

THE LACKAWANNA IRON & COAL COMPANY ET AL.
vs.
THE FARMERS' LOAN & TRUST COMPANY ET AL. } No. 503.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Texas, and was argued by counsel.

841 On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, at the costs of the appellants.

Petition for Rehearing.

United States Circuit Court of Appeals, Fifth Circuit.

LACKAWANNA IRON AND COAL COMPANY ET AL., Appellants,
versus
FARMERS' LOAN AND TRUST COMPANY ET AL., Appellees. } No. 503.

The petition of The Lackawanna Iron and Coal Company and of The Pacific Improvement Company, appellants in the above-entitled cause, respectfully represents:

That your petitioners pray for a rehearing in said cause, and for grounds of said rehearing assign the following, to wit:

I.

That this honorable court erred in its conclusion that the claim of petitioners is not one of the character repeatedly recognized by the Supreme Court of the United States as a charge in equity on the continuing income of a railway company, as well that which comes into the hands of the court after the receiver is appointed as that before, and that the court further erred in failing to hold that, in so far as this current-expense creditor is concerned, the court should use the income of the receivership in the way in which the company would have been bound in equity and good conscience to use it, if no change in the possession had taken place; and that the court further erred in failing to hold that, if the income of a railway company has been diverted from the payment of current-income creditors to the payment of mortgage creditors, or to the improvement of the mortgaged property, the current-income fund, to the extent to which it has been depleted, will be restored out of the proceeds of sale of the mortgaged property.

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II.

That this honorable court, in its opinion, has failed to consider the second proposition advanced by petitioners in the brief filed by them prior to the original hearing, at page 24 thereof, and in the oral argument of this cause, to wit, "that the Farmers' Loan and Trust Company, and the beneficiaries under its trust, have never had a lien upon any of the earnings of the Waco and Northwestern division of the Houston and Texas Central Railway Company, and they have no lien upon any such income now in the hands of the court."

That the court erred in not sustaining the foregoing proposition advanced by petitioners, and in not rendering a decree distributing the income now in the hands of the receiver ratably among all creditors of the defendant railway company before the court, in the event that it should fail to maintain the first proposition advanced by petitioners.

III.

That the court, in its opinion, has failed to consider the third proposition advanced by petitioners in the brief filed by them prior to the original hearing, at page 24 of the same, and in the oral argument, to wit: "If neither party has, nor at any time during this litigation had a lien on the income of the railways mortgaged in this case, then the court will proceed upon the principle that equality is equity, and will distribute the income ratably among all the creditors of the defendant railway company before the court."

That the court erred in not maintaining the said proposition, and in not rendering a decree distributing the income now in the hands of the receiver ratably among all creditors of the defendant railway company before the court, in the event that it should fail to maintain the first proposition advanced by petitioners.

843 Wherefore, petitioners pray that your honors will grant a rehearing herein, and permit this cause to be reargued before this honorable court, especially upon the last two propositions hereinbefore propounded; or in the event that this honorable court will not permit oral argument, then that it will grant said rehearing and permit briefs to be filed in support and amplification of the points above made; and petitioners pray for all further and general relief.

E. B. KRUTTSCHNITT,
E. H. FARRAR,
B. F. JONAS,
H. T. GURLEY,

Solicitors and of Counsel for Petitioners, The Lackawanna Iron and Coal Company and The Pacific Improvement Company, Appellants.

I hereby certify that the points presented in the above petition for a rehearing are in my opinion well founded in law.

E. B. KRUTTSCHNITT,
Of Counsel for Petitioners and Appellants.

Endorsed: Filed March 16, 1897. J. M. McKee, clerk.

Order Denying Petition for Rehearing.

United States Circuit Court of Appeals, Fifth Circuit.

November Term, 1896.

THURSDAY, *June 10th*, 1897.

(Extract from Minutes.)

LACKAWANNA IRON & COAL COMPANY ET AL. *vs.* FARMERS' LOAN & TRUST COMPANY ET AL. } No. 503.

Ordered, that the petition for rehearing filed in this cause be, and the same is, hereby denied.

844 *Opinion.*

Filed Feb'y 25, 1897.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1896.

LACKAWANNA IRON & COAL COMPANY ET AL., Appellants,
vs.
FARMERS' LOAN & TRUST COMPANY ET AL., Appellees. } No. 503.

Appeal from the circuit court of the United States for the eastern district of Texas.

Before Toulmin, Maxey and Parlange, district judges.

Statement.

On February 16, 1885, the Southern Development Co. filed its bill of complaint in the U. S. circuit court for the eastern district of Texas, against the Houston & Texas Central Railway Co. in a cause known as cause No. 185 of the equity docket of that court. The complainant alleged that the railway company was indebted to it in the sum of about $600,000 for money loaned at various times, and prayed for the appointment of a receiver. On February 21, 1885, receivers were appointed, and they took possession of all the property of the railway company.

On April 18, 1885, the Southern Development Co. filed its supplemental and amended bill in cause No. 185, whereby it made N. S. Easton and James Rintoul and The Farmers' Loan and Trust Co. defendants in their capacities of trustees of the various mortgages on the property of the railway company. The Southern Devel-pment Co. further prayed by said supplemental and amended bill, that an account be taken of the several amounts due it by said railway company, as also of all sums due to all the other creditors of said railway company who might intervene for the protection of their claims. An accounting was also asked of all amounts paid by the railway company to any of its mortgagees or bondholders; of all amounts paid for interest on bonds and of other items specified in the pleadings. The Southern Development Co. prayed that the amounts which the accounting would show it to be entitled to be declared liens on the net earnings of the railway company, and upon all its property, superior in rank to the claims of the
845 trustees, and to the mortgage bonds and coupons issued under various deeds of trust executed by said railway company.

On September 12, 1885, the Lackawanna Co. intervened in cause No. 185, and prayed that an account be had of the sum which the railway company owed it on certain contracts to be hereinafter mentioned more fully, and that its claim be decreed to be paid out of the net revenues of the railway company, and declared to be a lien thereon superior in rank to the claim of the trustees and mortgage bonds and coupons.

The bill of complaint of the Southern Development Co. in cause No. 185 was, upon the demurrer of the trustees, dismissed on May 27, 1886, without prejudice to the rights of complainants to assert their rights, if any they had. The decree discharged the receivers in cause No. 185. They were ordered to turn over all the property of the railway company to other receivers who had theretofore, in causes known as equity causes Nos. 198, 199 and 201 of the docket of said court, been appointed joint receivers of the property of the railway company, on the application of the trustees under various deeds of trust bearing on the property. The receivers in cause No. 185 delivered possession of the property to the receivers in causes Nos. 198, 199 and 201, on July 10, 1886.

The three causes, Nos. 198, 199 and 201, were consolidated as "consolidated cause No. 198." In this cause, the Lackawanna Co., on November 26, 1886, filed its intervention praying substantially for the same relief it had prayed for in cause No. 185. A final decree of foreclosure was rendered in cause No. 198, on May 4, 1888, and, on September 8th, 1888, all the property of the railway company was sold, and one, George E. Downs, became the purchaser of the Waco and Northwestern division of the railway company. But his purchase was made subject to the mortgage which was subsequently foreclosed in equity cause No. 227 of the docket of said court, and subject also to the right which the court reserved, to charge upon the property the payment of any amount that might be found due by reason of intervening petitions pending in cause No. 198, and which might be found to be entitled to priority over the mortgage in that cause.

846 The mortgage foreclosed in cause No. 227 is known as the "Waco and Northwestern Division first mortgage," and is a different mortgage from the mortgages upon which the other causes were based. It bore only on the Waco and Northwestern division of the railway company.

On November 3, 1891, the Lackawanna Co., in cause No. 227, filed its intervention which is now before this court. It is substantially the same as the interventions it filed in causes Nos. 185 and 198.

Subsequently to the final decree of May 4, 1888, to wit: on April 20, 1889, the Lackawanna Co. filed its petition in cause No. 198, praying that the receivership therein should continue over the property then in the possession of the court, until its claims should have been finally decreed and paid. On this petition an order was made ordering the receiver to retain possession of the property until the further order of the court. It was also ordered that the receivership, which had theretofore been ordered in cause No. 227, should be concurrent with the receivership in cause No. 198, and that the receiver should keep separate accounts of the earnings and expenses of the Waco and Northwestern division.

On October 21, 1895, Moran Bros. and Henry K. McHarg, holders of bonds secured by the mortgage or deed of trust which is the subject of cause No. 227, intervened in that cause *pro interesse suo.*

The intervention of the Lackawanna Co., in cause No. 227, which is now before this court, alleges that on December 28, 1882, on April

26, 1883, and on October 30, 1883, under three contracts respectively bearing said dates, it is agreed to furnish to the Houston & Texas Central Railway Co. about 20,000 tons of steel rails at prices stated in the contracts, and that upon the delivery of each 560 tons of rails, payments were to be made in cash or in notes of the railway company, payable in six months from the average date of delivery of the rails, with interest at six per cent. with the privilege of renewing the notes before maturity for a further term of six months by giving new notes and paying interest for the additional six months at six per cent. The intervenor alleges that it delivered 5,009
847 tons of rails under the second contract of date April 26, 1883, for which it received the promissory notes of the railway company; and that, under the third contract of date October 30th, 1883, it delivered about 8,552 tons of rails, for which it also received promissory notes of the railway company. The balances now claimed are $6,426.51 for rails claimed to have been used on the Waco and Northwestern division, under the second contract, and $99,300.64 for rails claimed to have been used on the same division under the third contract.

Intervenor alleges that the rails which it furnished were employed for the useful improvements and necessary repairs of the main line of the railway company and of its Western division; that the rails were so absolutely necessary to the railway company to replace the old iron with which its tracks were laid, that it is doubtful whether the railway company could have maintained its existence without them, and that prior to the improvement of the railway by means of the rails, accidents to life and limb and damage to property were so great, owing to the condition of the tracks of said company, that the name of the Houston & Texas Central Railway Co. became a terror to the traveling and shipping public, and a byword and a reproach. The intervenor further alleges that by means of the rails furnished by it, the railway has been kept in safe running order, the business increased and the railway rendered more valuable to the bondholders. It is also alleged that the indebtedness was contracted in consideration of the promise of the railway company to pay the same out of its earnings, and that intervenor made the contracts under the expectation and belief that its claim would be paid out of the earnings, by preference over the bondholders.

The intervenor further alleges, "that it is provided by the various deeds of trust securing the mortgage bonds upon the various portions of the railway of the railway company, that the trustees of such mortgages, if they acquire possession of said railway under said mortgages, shall pay any floating debt or debts of said company out of the gross earnings of the said railway, and that, under and by virtue of said provision, your petitioner's claims aforesaid are specially made preferred claims upon the gross earnings of
848 said railway, and enjoy priority over all mortgages bearing upon the same, and are entitled to be paid out of the gross earnings of said railway, before said earnings are applied to the payment of any encumbrances whatsoever upon the same, and that your petitioner made the loans hereinabove described, relying upon

the said clause in the said mortgages, and in the expectation that the said company would comply with the obligation therein recognized by itself and by its mortgage bondholders, and that it would pay your petitioner's said claim before applying any part of its gross earnings to the payment of coupons or other bonded indebtedness. That said company and its bondholders are thus not only by law, but by contract, obligated to apply current earnings to payment of current expenses, and that such claims for current expenses are specially made preferred claims upon the gross earnings of said railway over all claims of bondholders."

It is also alleged that the railway company has not only failed to pay but has used a large amount of the earnings for the payment of coupons on the bonds secured by the mortgage upon which a bill of foreclosure was filed in the cause. Intervenor alleges and claims that the revenues of the railway company should be applied to the payment of the claim for rails by preference over all bondholders and coupon-holders.

By proper pleadings, The Farmers' Loan and Trust Co., complainant in cause No. 227, on December 7, 1891, and Moran Bros. and Henry K. McHarg, intervenors, on January 13, 1896, objected to and opposed the allowance of the demand of the Lackawanna Coal and Iron Co. as a preferential claim. Moran Bros. and Henry K. McHarg specially pleaded the statute of limitation of two and four years.

The matter of the intervention of the Lackawanna Co. was referred to a master, who reported adversely to the demand.

The master's report was not excepted to. *Inter alia*, the master reports the following findings:

On December 28, 1882, intervenor entered into a written contract with the railway company to deliver to it 5,000 tons of steel
849 rails in March, April and May, 1883, payment to be made in cash on delivery of the rails or in notes of the purchaser, payable at six months, with six per cent. annual interest. Under this contract, 5,020 tons of rails were delivered, in payment of which the railway company executed its ten promissory notes to the intervenor, payable at six months, amounting with interest to $206,932.16; all of which notes were either paid at maturity or at the maturity of other notes given in renewal.

On April 26, 1883, another written contract was entered into by the same parties for the delivery of 5,000 tons of rails during August, 1883, or earlier if called for; payment to be made in cash or in notes of the purchaser payable at six months with six per cent. annual interest. This contract provided that the railway company should have the privilege to renew the notes before their maturity for a further term of six months, by paying the interest, six per cent., or adding the interest to the new notes. Under this contract 5,009 tons of rails were delivered during June, August and September, 1883, and ten promissory notes payable at six months from their dates, dated on divers days in June, August and September, 1883, and aggregating with interest $201,346.64, were delivered to intervenor. As these notes matured, payment of so much of the

debt as was not satisfied at maturity, was extended, until, in process of such settlement and extension, the railway company, in settlement of the balance due under the contract of April 26, 1883, delivered to intervenor eight promissory notes, payable at four months from their dates, dated on divers days in September, October and December, 1884, and aggregating $118,000. During the negotiations between intervenor and the railway company, which resulted in the execution of these renewal notes, intervenor demanded that the railway company should secure the renewal notes by the hypothecation of collaterals, and in response to such demand the railway company hypothecated with the intervenor 170 first-mortgage bonds of the Galveston, Harrisburg and San Antonio Railway Co., which, by agreement of counsel, are admitted to be worth $157,250.

On October 30, 1883, the same parties entered into another written contract, similar in general terms to the other contracts, and containing the clause securing to the railway company the privilege of renewing the notes, and providing for the delivery of 10,000 tons of steel rails between February 1st and August 1st, 1884. Under this contract, intervenor delivered 8,552 tons of rails during February, March, April and May, 1884. Through error, eight notes, in payment of rails supplied under this contract, dated on divers days in February and March, 1884, were made payable at twelve instead of six months. They were, however, accepted by intervenor. Afterwards, in April and May, 1884, the railway company, in settlement of the balance due on the 8,552 tons of rails delivered under the contract of October 30, 1883, delivered to intervenor nine promissory notes, payable at six months from their dates and renewals for a like term at the maker's option. Each of these notes were renewed for six months. The seventeen notes given under this contract were dated on divers days in February, March, October and November, 1884, and aggregate $327,175.50.

The master's report also contains the following findings:

"I find that negotiable promissory notes were given petitioner by the defendant company for all rails sold under the three contracts; that all of said sales were made on a stated credit for a fixed period of time, viz: six months after the average date of each delivery, and that said defendant company had the right, under said contracts, to extend the time six months longer from the maturity of said notes; that such extensions were made for the accommodation and to suit the convenience of said defendant company, and that said extended negotiable notes remaining unpaid matured, as shown above in clauses 2 and 3, during the months of February, March, April and May, 1885.

"I find that all the rails delivered under the first contract, and about one-half of the rails delivered under the second contract, were paid for by the railway company prior to the appointment of any receiver of said property, but that the remaining half under the second contract, and all rails furnished under the third contract, are not paid for.

"I find that the rails furnished under the second contract
851 were furnished under a contract made a year and ten months prior to the appointment of the receiver in cause No. 185, and about three years and three months prior to the appointment of the receiver in consolidated cause No. 198, and about six years prior to the appointment of the receiver in this cause.

"I find that the rails furnished under the third contract were furnished under a contract made about sixteen months prior to the receivership in cause No. 185, and about two years and nine months prior to the receivership in consolidated cause No. 198, and about five years and six months prior to the appointment of the receiver in this cause."

* * * * * * *

"I find that the debt for which the Lackawanna Company claims payment in its petition herein cannot be classed as a current debt made in the ordinary course of business as those terms seem generally to be understood, yet it appears that at the time when the contracts hereinbefore mentioned were entered into between said Lackawanna Company and the defendant railway company, that the condition of the track of the defendant railway company was such that the demand for new rails upon the most worn portion of the roadway was practically imperative. For a number of years prior to December, 1882, only about 5,000 tons of new rails had been purchased. The road north from Houston for 90 miles was built in 1857–1861, and thence northward to Denison, 1867–1872. The Western division, leading to Austin, was constructed in part prior to 1861 and completed in 1873, and the Waco division was completed about 1875. The condition of these roads was bad, except such portions as had been relaid with 5,000 tons of rails purchased prior to December 28th, 1882. There was continual breakage of rails and wrecking of trains, the track was unsafe, and was generally so regarded, not only by 'railroad men,' but by the traveling public. The damage to merchandise, rolling stock, etc., was continuous, and the need for new rails appears to have been 'absolutely necessary as a preservation of human life, the loss of which was liable to occur at any moment.'"

"I find that when the aforesaid contracts were made with the
852 said Lackawanna Company, both seller and buyer expected the debts to be paid from the net income of the railway; that the credit extended under said contracts was at the request of and for the accommodation of the defendant railway company and upon its general credit; that said sales were made without any stipulation that security should be given by the defendant company for said rails, or that payment therefor should be made out of any particular fund or in any particular way; that said sales were for an unusually large amount of rails, and the defendant was unable to pay cash therefor, and there was no other way of obtaining said rails except upon credit; and petitioner herein, at the time of said contracts and sales, had knowledge of the mortgage of June 16th, 1873, given by the defendant railway company upon the properties

of its Waco & Northwestern division to secure the first-mortgage bonds, which said mortgage has been herein foreclosed."

* * * * * * *

"I find in the mortgage given by the Houston & Texas Central Railway Company to the Farmers' Loan & Trust Company, trustee, dated June 16, 1873, being the same mortgage declared on herein, the following provisions: And 'in case the said Houston & Texas Central Railway Company shall fail to pay the principal, or any part thereof, or any installment of the interest, or any part thereof, or any of the said bonds at any time when the same shall become due and payable according to the tenor thereof, and for sixty days after having been demanded, it shall be competent for the said trustee, its successors or assigns, to enter upon the said railway and the premises and property herein conveyed, by its attorneys and agents, and take possession of the same without let or hindrance of the said first party, and every part and parcel thereof, and the appurtenances, and appoint an agent to operate and manage the same, and receive the revenue and income thereof, applying the said funds, after deducting taxes, necessary expenses and counsel fees, to keep the same in good order and repair, and the surplus to pay the principal and interest of all the bonds which may be due and outstanding, and secured thereby *pro rata*, and thereafter to the payment of any contributions due to the sinking fund herein established.
853 And upon the request of the holders of one-fifth in amount of the bonds so in default which may be at any time outstanding under this deed of trust, it shall be the duty of said second party, by its president, or agent duly appointed in its behalf, to enter upon and take actual possession with or without entry or foreclosure of said railway and property herein described, and all and singular each and every part and parcel thereof, and assume its management until the arrears of both principal and interest be paid, or the property sold, as herein prescribed, receiving the rents, revenues and income thereof, and applying them in the same manner as above stated.' * * *

"'It is however expressly agreed that the said party of the first part may dispose of the current net revenues and income of all the said property and railway hereby conveyed in such manner as it shall deem best, until default shall be made in the payment of the interest or principal of said bonds, or of any one or more of them, and shall have the right to sell and dispose of any of such real estate or any other property as it may own or acquire which may not be needed or required for the purposes and business of the said Waco and Northwestern division, except in the case of the six thousand acres per mile of completed road, and which sale and conveyance of such outside property shall transfer the said property and title free from encumbrance of this mortgage or deed of trust, and to change its tracks and make any and all alterations necessary for the benefit of the same.'

"I find that there is no provision in said mortgage that the trustee may, if it acquired possession of said railway under said mort-

gage, pay any floating debt or debts of said company out of the gross earnings of said railway."

The lower court confirmed the master's report and dismissed the intervention. The Lackawanna Co. has appealed.

PARLANGE, district judge, delivered the opinion of the court:

It is contended, on behalf of the Lackawanna Iron and Coal Company, that its claim is a preferential one within the doctrine of Fosdick *vs.* Schall, 99 U. S. 225, and other cases in which certain
854 claims were accorded preference over the holders of railroad mortgage bonds. The intervenor's counsel urge that the case of Burnham *vs.* Bowen, 111 U. S. 777, is analogous in principle to the present case. The urgent need of the railway company for the rails supplied by the intervenor, the dilapidated condition of the road prior to the supplying of the rails, the danger to life, limb and property which resulted from such condition, the increased business of the road and the augmented value of the bondholders' security, are asserted and are pressed upon the court's attention as considerations for declaring the intervenor's claim preferential.

Even if all these assertions were sustained by the findings—and some of them do not appear to be so sustained—the intervenor's claim to a preference would, in our judgment, have to be rejected. We do not understand that the doctrine enunciated in Fosdick *vs.* Schall, *supra*, was based merely or mainly upon the urgency of the need of the railway for the labor, supplies or equipment to which a preference is accorded. Nor do we apprehend that the mere fact that the supplies, labor or equipment furnished may have augmented the value of the bondholders' security, gives rise to a preference. In the light of Fosdick *vs.* Schall, *supra*, and the other cases in which the supreme court and other courts have followed the main case, our understanding of the doctrine is that, within narrow limits, a court of equity having in its custody a railroad which is being foreclosed by its mortgage creditors may make preferential payment of such claims, as debts due to operatives, limited amounts due to connecting roads for unpaid freight and ticket balances, limited amounts due for supplies needed from day to day or from month to month in the ordinary course of the railroad's operations. The controlling principle appears to be that a railroad having public duties to discharge must be kept a going concern while in the hands of the court, and that to that end debts due its employees and other current debts due for its ordinary operations, and which it is not usually practicable to pay for in cash, and which are, therefore, payable on short terms, should be paid as they would
have been paid if the court had not taken away from the cor-
855 poration the control of the railroad. A cessation of the railroad's operations by failure to pay promptly the operatives or such other debts as railroads must necessarily incur from their ordinary current operations, must be prevented.

The payment of preferential debts included within the narrow limits indicated operates no impairment of the bondholders' rights, for it is made both in the interests of the property and of the public.

One purpose is to preserve the property in such condition that it may be sold as a growing concern, and thus may suffer no diminution of value while in the hands of the court. This is to the direct benefit of all creditors. The other purpose is to enable the railroad to continue the performance of its public duties. Of this the creditors will not be heard to complain, because they are charged with knowledge of the public obligations of their debtor.

In Finance Co. *vs.* Charleston C. & C. R. Co., 62 F. R., 205, the circuit court of appeals for the fourth circuit, through Mr. Chief Justice Fuller, after stating certain debts which may be paid by preference, says: "Of course, the discretion to enter such orders should be exercised with great care." The Chief Justice then refers to the case of Thomas *vs.* Western Car Co., 149 U. S., 95, as indicating the narrow limits within which a court of equity should confine itself in making preferential payments over railroad mortgagees.

In Thomas *vs.* Western Car Co., just cited, the Supreme Court quoted approvingly from Kneeland *vs.* American Loan Co., 136 U. S., 88, where it was said:

"The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases, this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured
856 indebtedness, in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as a holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company when property is mortgaged, must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced."

In Thomas *vs.* Western Car Co., *supra*, the Supreme Court proceeded to say:

"The case of a corporation for the manufacture and sale of cars dealing with a railroad company whose road is subject to a mortgage securing outside bonds, is very different from that of a workman and employees, or of those who furnish, from day to day, sup-

plies necessary for the maintenance of the railroad. Such a company must be regarded as contracting upon the responsibility of the railroad company, and not in reliance upon the interposition of a court of equity."

In Kneeland *vs.* American Loan Co., *supra*, it is said

"It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

In Bound *vs.* S. C. R'y Co., 58 F. R., 473, the circuit court of appeals for the fourth circuit, Mr. Chief Justice Fuller sitting as a member of the court, in a case almost identical with the present case, said:

"The Supreme Court has recently in Thomas *vs.* Car Co., 149 U. S., 95, indicated the narrow limits to which an equity
857 court should confine itself in allowing any unsecured claim to displace vested contract liens. Wages due employees, current operating expenses, current balances of ticket and freight money arising from indispensable business relations and similar current debts accruing within 90 days, are recognized as among the limited class of claims which in its discretion the court may allow to have priority. In the case cited the Supreme Court held it error to allow a claim for the rental of cars necessary to operate the road for the six months prior to the receivership."

Bound *vs.* S. C. R'y Co., *supra*, has been cited by the circuit court of appeals for the fourth circuit, in Finance Co. *vs.* Charleston, etc., Co., 62 F. R., 208; by Circuit Judge Simonton in Central Trust Co. *vs.* Charlotte C. & A. R. Co., 65 F. R., 269, and by Circuit Judge Colt in Wood *vs.* N. Y. & N. E. R. R., 70 F. R., 743.

It would subserve no useful purpose to cite more extensively from the numerous authorities which show the narrow and restricted limits within which, in cases such as the matter in hand, preferential payments can be made. No case has been cited nor has any come under our observation in which such a claim as that of the Lackawanna Co. has been on final adjudication allowed a preference.

The case of Burnham *vs.* Bowen, *supra*, relied on by the intervenor's counsel and claimed to be analogous in principle to the instant case, was based on a demand for coal used in running the locomotives, supplied to the railroad company a few months before the appointment of a receiver, and the claim was found by the Supreme Court to be "one of the current debts for operating expenses made in the ordinary course of continuing business." We discover no similarity of principle between that case and the case at bar. Coal is an article of constant and uninterrupted consumption on a railroad, and its purchase at short intervals, for the purpose of running the locomotives in quantities not exceeding the operating requirements of the road are clearly current expenses of the road. But it is difficult to see how the purchase of 20,000 tons of rails

made under the circumstances stated in the intervenor's own pleadings can be a current debt "for operating expenses made in
858 the ordinary course of continuing business." If the road was in the condition of dilapidation, which is inferable from the intervenor's averments, it might be sufficient to say, in denying the demand that the rails were supplied, not as a matter arising in the ordinary course of a railroad's operations, but for the virtual reconstruction of the road. No authorities need be cited to establish the proposition that works of reconstruction are not entitled to preferential payment.

That the necessity for the supplies does not entitle to preferential payment unless the supplies are for the current expenses in the ordinary course of operation, is forcibly shown by the case of Morgan's L. & T. R'y Co. *vs.* Texas Central R'y Co., 137 U. S., 171, in which it was substantially held that the mere fact that money was loaned to a railroad company to pay the interest on its first-mortgage bonds, does not entitle the lender to preference, and that although advances of money may have enabled a railway company to maintain itself, that fact alone does not entitle the lender to priority. The contention that the intervenor is entitled to preference, because the rails supplied to it must have enhanced the value of the bondholders' security, is clearly untenable. In Railway Co. *vs.* Cowdry, 11 Wall., 482, Mr. Justice Bradley, as the organ of the court, said:

"As to the point of giving priority to the last creditor for aiding to conserve the thing, all that is necessary to say is, that the rule referred to has never been introduced into our laws except in maritime cases which stand on a particular reason." Also see Thompson *vs.* White Water Valley R. R., 132 U. S. 68; Jones on Corporate Bonds and Mortgages, sec. 584; Fogg *vs.* Blair, 133 U. S., 534; Toledo R. R. Co. *vs.* Hamilton, 134 U. S., 296.

The unusually large purchase of rails, the time within which they were to be delivered, the condition of the road, the contracts providing for notes at six months renewable for a like term at the maker's option, the hypothecation of securities for the payment of the claim, the knowledge which the intervenor had of the mortgage, the fact that the contracts contained no promise to pay out of any particular fund, the time which elapsed between the date of the contracts and the appointment of a receiver in cause No. 185—are circumstances which, taken together, cannot fail to convince
859 us that the intervenor relied upon the general credit of the railway company.

We see no error in the action of the circuit court in dismissing the petition of intervenor and the decree appealed from is, therefore, affirmed.

I, J. M. McKee, clerk of the United States circuit court of appeals, for the fifth circuit, do hereby certify that page 1, pages 8 to 78, inclusive, pages 565 and 566, pages 572, 573, 574 and 575, pages 587 to 610, inclusive, pages 616 to 687, inclusive, page 825, and pages 840 to 859, inclusive, of the foregoing transcript, contain a true, full,

and perfect transcript of the record of cause No. 503, wherein The Lackawanna Iron & Coal Company *et al.* were appellants and The Farmers' Loan & Trust Company were appellees, as fully and completely as the same now remains on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, for the fifth circuit, at the city of New Orleans, this 16th day of June, A. D. 1897.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

860 Circuit Court of Appeals, Fifth Circuit.

LACKAWANNA IRON & COAL CO. ET AL., Appellants,
vs.
FARMERS' LOAN & TRUST CO. ET AL., Appellees. } No. 503.

A writ of certiorari having been granted The Lackawanna Iron & Coal Company and The Pacific Improvement Company, appellants in the above cause, commanding that the record and proceedings therein be sent to said Supreme Court without delay, and it appearing that said appellants filed a true and correct copy of the record and proceedings had in said cause in this court and in the circuit court as part of and with the application for certiorari, and which copy is now on file in said Supreme Court—

It is therefore agreed that the said certified copy of the record and proceedings on file in the Supreme Court may be taken as a return to the writ of certiorari, and that this agreement be filed in the circuit court of appeals, so that the clerk may send up a copy thereof with his return to said writ and may in and be his said return make said certified copy of said record now on file in the Supreme Court a part of his said return.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

E. B. KRUTTSCHNITT,
Solicitor for Appellants and Applicant for Writ of Certiorari.
L. W. CAMPBELL,
Solicitor for Appellees Moran Bros. & McHarg.
M. F. MOTT,
Solicitor Farmers' Loan & Trust Co.

861 [Endorsed:] No. 503. Circuit court of appeals, fifth circuit. Lackawanna Iron & Coal Co. *et als.*, appellants, *vs.* Farmers' Loan & Trust Co. *et als.*, appellees. Stipulation as to return to certiorari.

862 United States Circuit Court of Appeals, Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing page con-

tains a true copy of the stipulation as to return to certiorari in case of Lackawanna Iron & Coal Company *et als.*, appellants, *vs.* Farmers' Loan & Trust Company *et als.*, appellees, No. 503, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 17th day of March, A. D. 1898.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

863 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Lackawanna Iron & Coal Company *et al.* are appellants and The Farmers' Loan & Trust Company *et al.* are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the eastern district of Texas, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into
864 the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 26th day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

865 [Endorsed:] Case No. 16,664. Supreme Court of the United States. No. 162, October term, 1898. The Lackawanna Iron & Coal Co. *et al. vs.* The Farmers' Loan & Trust Co. *et al.* Writ of certiorari and return. Office Supreme Court U. S. Filed Mar. 19, 1898. James H. McKenney, clerk.

The within writ received this March 17, 1898. In accordance with the agreement of counsel in the cause named in the within writ filed in the office of the clerk of the United States circuit court of appeals for the fifth circuit, a certified copy of which is hereto attached and made a part of this return, this writ is now returned

to the Supreme Court of the United States, and I, J. M. McKee, clerk of said United States circuit court of appeals, do hereby certify that the transcript of record in the within-named cause now on file in the Supreme Court of the United States is a true, full, and perfect transcript of the record, as fully and completely as the same now remains of record and on file in my office.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 17th day of March, A. D. 1898.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: Case No. 16,664. U. S. circuit court of appeals, 5th circuit. Term No., 162. The Lackawanna Iron and Coal Company *et al.*, petitioners, *vs.* The Farmers' Loan & Trust Company *et al.* Petition for writ of certiorari and exhibit thereto. Filed September 4, 1897.